IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE

Before Shri George George K, JM & Ms.Padmavathy S, AM

IT(TP)A No.82/Bang/2015 : Asst.Year 2010-2011

The Assistant Commissioner of Income-tax, Large Tax Payers Unit (LTU) Bengaluru.	v.	M/s.AstraZeneca Pharma India Limited, NI 12th Floor, Manyata Embassy Business, Rachenahalli, Outer Ring Road Bangalore – 560 045. **PAN : AABCA1722B.**
(Appellant)		(Respondent)

IT(TP)A No.170/Bang/2015 : Asst.Year 2010-2011

M/s.AstraZeneca Pharma India Limited, NI 12th Floor, Manyata Embassy Business, Rachenahalli, Outer Ring Road Bangalore – 560 045.	v.	The Assistant Commissioner of Income-tax, Large Tax Payers Unit (LTU) Bengaluru.
(Appellant)		(Respondent)

Revenue by : Sri.Manjunath Karkihalli, CIT-DR
Assessee by : Sri.Nageshwar Rao, Advocate

Date of Hearing : 12.10.2022		**Date of Pronouncement : 14.10.2022**

O R D E R

Per George George K, JM :

These cross appeals are directed against final assessment order dated 31.12.2014 passed u/s 143(3) r.w.s. 144C of the I.T.Act. The relevant assessment year is 2010-2011.

2. The brief facts of the case are as follows:

The assessee is a company engaged in the manufacture and sale of pharmaceutical products. It also undertakes co-ordination of clinical trial services. For the assessment year 2010-2011, the return of income was filed declaring taxable

income at Rs.82,06,30,629. The assessment was selected for scrutiny and notice u/s 143(2) of the I.T.Act was issued on 22.09.2011. During the course of assessment proceedings, it was noticed that the assessee had entered into several international transactions with its Associate Enterprises (AEs), which had exceeded Rs.15 crore. The A.O. referred the matter to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price (ALP) of the international transactions undertaken by the assessee with its AEs. The TPO passed order u/s 92CA of the I.T.Act dated 29.01.2014 proposing Transfer Pricing adjustment of Rs.11,84,06,803. Pursuant to the TPO's order, draft assessment order was passed dated 28.02.2014, wherein the A.O. incorporated the TP adjustment suggested by the TPO. The A.O. also made disallowance on corporate tax matters. The corporate tax disallowance was on account of freebies provided to medical practitioners. The Assessing Officer based on Circular 5/2012 dated 01.08.2012, disallowed the following expenses:-

Cost of samples distributed	Rs.3,71,20,122
Travel and conveyance provided to Doctors.	Rs.11,04,735
Gifts and donations provided to Doctors	Rs.1,11,39,591
Total	Rs.4,93,64,448

3. On receipt of the draft assessment order, the assessee filed objections before the Dispute Resolution Panel (DRP) on 07.04.2014. The DRP issued its directions dated 27.11.2014. Consequent to the DRP's directions, the TP adjustment was deleted. The DRP as regards freebies provided to medical

practitioners, namely, cost of sample distributed amounting to Rs.3,71,20,122 was also directed to be deleted. Pursuant to the DRP's directions, final assessment order was completed vide the impugned order dated 31.12.2014. The computation of income as per the final assessment order is as under:-

Computation of Income	
Taxable income as declared by the assessee.	Rs.82,06,30,629
Add : Disallowances (a) Travelling & Conveyance to Doctors	Rs.11,04,735
(b) Gifts and donations provided to Doctors	Rs.1,11,39,591
Assessed Income	Rs.83,28,74,960

4. Aggrieved by the final assessment order, both the Revenue and assessee have filed appeal before the Tribunal.

We shall first adjudicate the Revenue's appeal

IT(TPA) No.82/Bang/2015 (Revenue's appeal)

5. The grounds raised read as follows:-

> *"1. The directions of DRP is opposed to law and facts of the case.*
>
> *2. The Hon'ble DRP has erred in giving decision in favour of the assessee without giving opportunity of being heard to the revenue as per provision of sec. 144C(11).*
>
> *3. The Hon'ble DRP has erred in giving decision merely on the basis of assessee's submission without considering all the facts of the case in totality.*
>
> *4. The Hon'ble DRP has erred in allowing the assessee to raise new objection of RPT which was never been raised before TPO.*
>
> *5. The Hon'ble DRP has erred in giving relief on the basis*

of assessee's submission the comparable is following December end FY ignoring the fact that TPO provided March 2010 financials to the assessee along with show cause notice.

6. The Hon'ble DRP has erred in excluding AE as well as non - AE segments on the ground of RPT when RPT in non -AE segment is zero.

7. Whether the decision of Hon'ble DRP is within the purview of Sec. 144C of the IT Act.

For these and such other grounds that may be urged at the time of hearing."

6. During the course of hearing, contentions were raised only with reference to grounds 1 and 2 and whether the DRP was justified in excluding Lotus Labs as a comparable. In grounds 1 and 2, it is alleged that DRP has not given opportunity of hearing to the Revenue. In this context, it is to be mentioned that the AO / TPO filed rectification application before the DRP raising certain contentions on merits. The DRP has noted that the notices were issued to the AO, however, the AO failed to appear on the date of hearing. The DRP rejected the rectification application vide order dated 05.01.2015. Copy of the same is placed on record at page 7 to 10 of the paper book-I filed by the assessee. Since notice of hearing was given to the AO / TPO and he had failed to appear, we see no merit in the contention raised in grounds 1 and 2. Therefore, we dismiss grounds 1 and 2 raised by the Revenue.

7. As regards the issue of exclusion of Lotus Labs as a comparable by the DRP, it is necessary to briefly recapitulate the facts. As mentioned earlier, the assessee had entered into

several international transactions, which are detailed at page 2 of the TPO's order dated 29.01.2014. One of such transactions is "provision of global clinical trial services". The profile of the assessee in respect of global clinical trial co-ordination is detailed in TP study of assessee, which is placed on record at page 338 of the paper book filed by the assessee. The FAR analysis is also placed on record at page 347 to 350 of the paper book-I filed by the assessee. The list of comparable finally selected by the assessee in its TP study and its average margin at 9.53% is placed at page 388 of the paper book-I filed by the assessee. Since the assessee's margin as per the TP study was determined at 11.01% (refer page 389 of the paper book-I filed by the assessee), the assessee sought to justify the ALP of the international transactions undertaken by the assessee in respect of "provision for global clinical trial services".

8. The TPO in his order dated 29.01.2014 re-characterized this transaction as a full-fledged Clinical Research Organisation (CRO). The TPO selected a single comparable, namely, Lotus Labs with the operating margin of 48.78% on cost. Consequently, the TPO directed TP adjustment of Rs.11,84,06,803.

9. The DRP in its directions dated 27.11.2014, upheld the action of the TPO to the extent of characterization of assessee as a CRO. However, the DRP rejected Lotus Labs as a comparable considering high related party transaction (RPT),

being much in excess of 25% of total revenue. On giving effect to the DRP's directions, the TP adjustment was deleted and final assessment order was passed in consonance with the same.

10. We have heard rival submissions and perused the material on record. We are of the view that Lotus Labs cannot be accepted as a comparable as it has significant RPT as per the financials of Lotus Labs for December 2010 sourced from the Ministry of Corporate Affairs Website and the year ending March 2010. The RPT worked out as under:-

Nature of transaction	December 2010	March 2010
Service income received (A)	61,05,21,550 (Refer page 1013 of paper book-III (320318981+ 248649911+40919609+ 633049)	53,79,19,528 (Refer page 1043 of apper book-III (197418806+ 312980622 + 27520100)
Total revenue (as per segmental details (B)	81,48,46,730 (refer total revenue under segmental details in page 1011 of paper book-III)	67,46,59,036 (refer total revenue under segmental details in page 1043 of paper book-III)
RPT percentage (A/B)	74.92%	79.73%

11. The above working of RPT was not controverted by Revenue, even before the Tribunal. Therefore, Lotus Labs was rightly rejected by the DRP and not taken as a comparable. In this context, we would also like to state that the Tribunal in assessee's own case for assessment year 2009-2010, has remanded the issue of Lotus Labs RPT to the files of the TPO

for verification. The TPO while giving effect to the Tribunal order for assessment year 2009-2010, had excluded Lotus Labs as a comparable after verifying the facts from the financial statement and noting that the company has significant RPT transaction. Therefore, in the light of the aforesaid reasoning, the Revenue's appeal is dismissed.

IT(TP)A No.170/Bang/2015 (Assessee's appeal)

12. The assessee has raised 11 grounds. Grounds 1 to 3 are general and no specific adjudication is called for, hence, they are dismissed. The other grounds, namely, grounds 4 to 11 read as follows:-

> ***Corporate Tax Grounds:***
>
> *4. The learned AOI DRP has erred, in law and in facts in applying the CBDT Circular No 5/2012 ("CBDT circular") without considering whether there has been any violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ("!MC Regulation") and disallowed an amount of Rs 1,22,44,326 in respect of travel, conveyance, gifts and donations provided to Doctors without granting sufficient opportunity to submit the factual/ technical arguments.*
>
> *5. The learned AOI DRP has erred, in law and in facts in applying the CBDT Circular without appreciating the fact that the !MC Regulation are applicable only to medical practitioners and shall not extend to pharmaceutical and allied healthcare companies.*
>
> *6. The learned AOI DRP has erred, in law and in facts in applying the CBDT Circular without appreciating that there was no violation of the IMC Regulation and therefore no part of the above amount of Rs 1,22,44,326 in respect of travel, conveyance, gifts and donations can be validly disallowed.*
>
> *7. Without prejudice to Grounds 4, 5 and 6, the learned AO/ DRP has erred in law by applying the CBDT Circular without considering the fact that the amendment to the IMC Regulation. is effective from 10 December 2009.*
>
> *8. The learned AO/ DRP has erred, in law and on facts, in disallowing the amount of Rs.1,22,44,326, on the ground that the*

same is hit by the Explanation to section 37(1) of the Act.

9. The learned AO/ DRP has erred, in law and in facts, in levying interest of Rs 9,15,607 under section 234D of the Act.

Transfer Pricing Grounds:

10. The learned TPO/ AO/ DRP have erred, in law and in facts in not accepting the functional and economic analysis undertaken by the Appellant and in characterizing the Appellant as a Clinical Research Organization ("CRO") as opposed to a mere coordinator of clinical trial activities being carried out in India on behalf of its AE.

11. The learned TPO/ AO/ have erred, in law and in facts, by wrongly including unrelated expenses reimbursed by the AE amounting to Rs.129,870,583, reimbursement paid to the AE amounting to Rs 11,425,743 and third party expenses of Rs.88,800,000 made to hospitals/ sites/ investigators etc. in the cost base for mark-up purposes."

13. The assessee has also raised additional grounds 12 to 13.1 by application dated 10.08.2020. Further, additional grounds 14 to 14.3 were raised by the assessee by application dated 02.02.2021. However, no contentions were raised with reference to grounds 12 to 13.1. Hence, the same are dismissed. The additional grounds 14 to 14.3 raised vide application dated 02.02.2021, read as follows:-

"14. Refund of excess taxes paid on distribution of dividend

14.1 Based on facts and the circumstances of the case and in law, the tax liability on dividend, being taxable in the hands of non-resident shareholders, ought to have been restricted to the rate prescribed under the India-Sweden DTAA Double Taxation Avoidance Agreement (DTAA).

14.2 Based on facts and the circumstances of the case and in law, the rate of tax on the dividend paid by the Appellant ought to have been restricted to lower tax rate provided in the DTAA entered by India with another country which is a member of the Organisation for Economic Co-operation and Development (OECD) in view of provision of Article 10 and the

Protocol between India-Sweden DTAA.

14.3 Based on facts and the circumstances of the case and in law, the Appellant prays that it is eligible for refund of the excess Dividend Distribution Tax paid by the Appellant."

Grounds 4 to 8 (Corporate Tax Issues – Disallowances / Additions)

14. During the relevant financial year, the assessee had incurred the following expenditure:-

Particulars	Amount (Rs.)
Cost of samples distributed	3,71,20,122
Travel and conveyance provided to Doctors	11,04,735
Gifts and donation provided to Doctors which includes the following expenses- -Publicity and literature amounting to Rs.22,19,263 - Conference and symposium amounting to Rs.50,94,395 - Other marketing expenses amounting to Rs.38,25,933.	1,11,39,591
Total	4,93,64,448

15. The A.O. disallowed the above mentioned expenses amounting to Rs.4,93,64,448 relying on Board Circular No.5/2012 dated 01.08.2012. The DRP allowed the deduction for cost of samples amounting to Rs.3,71,20,122. The DRP upheld the action of the A.O. in respect of disallowance of travel and conveyance amounting to Rs.11,04,735 and gift and donations provided to Doctors amounting to Rs.1,11,39,591 (total disallowance of Rs.1,22,44,326).

16. Aggrieved, the assessee has raised this issue before the Tribunal. The learned AR submitted that by incurring these

payments to Doctors, the assessee has not violated the MCI Regulation. It was contended that the expenses incurred by the assessee towards Doctors are not hit by the judgment of the Hon'ble Supreme Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT reported in (2022) 442 ITR 1 (SC). The assessee has filed elaborate written submission. The content of the same for ready reference is reproduced below:-

> *Although detailed bifurcation of abovementioned expenses incurred alongwith nature of expenses were furnished before the lower authorities such expenditure was disallowed in entirety without appreciating that such expenses were not violative of MCI regulations. AO did not verify whether the expenses incurred by the Appellant falls within the ambit of MCI regulations but disallowed the entire expenditure relying on Circular 5/2012 without specifically highlighting as to how each expense is violative MCI Regulations and CBDT circular. Both the authorities failed to examine and find how details/documents filed by the Appellant justify disallowance. Disallowance was made under section 37 of the Act on a mistaken notion / presumption without verification of same in context of MCI regulations.*
>
> *In this context. to understand the issue involved. it is pertinent to note that the Hon'ble Courts before decision of Hon'ble Supreme Court in case of M/s Apex Laboratories Pvt. Ltd. v. DCIT (SLP No. 2320712019)) held that MCI Regulations are not applicable on Pharmaceutical companies and the expenses incurred by such companies are not violative of CBDT circular. During this phase assessments were on adhoc summary basis and critical evaluation of expenditure was not carried out in present appellant's case also. After decision of Hon'ble Supreme Court it has become necessary to critically evaluate each of the expenditure to see if disallowance is justified.*
>
> *Without prejudice to above. during the course of assessment proceedings for assessment year 2016-17. AO specifically raised a query in relation to expenses incurred on doctors (notice enclosed as Annexure 6 to application for admission of additional evidences @ Pg 65-67) and Appellant filed details/ information in response to such notice/query (submission enclosed as Annexure 6 to application for admission of*

additional evidences @ Pg 69-77). It may kindly be appreciated that the assessing officer after analysing the nature of expenses (similar to expenses incurred in assessment year 2010-11) in the context of MCI guidelines and the CBDT Circular 05/2012 dated 01.08.2012 accepted the claim of the assessee and did not make any disallowance in the assessment order (enclosed as Annexure 7 to application for admission of additional evidences @ Pg 78-86). This is because even if criteria as laid down in CBDT circular as also MCI regulation (as now affirmed in decision by Hon'ble Supreme Court) is applied. expenditure incurred towards contractual obligation with doctors and employee doctors of pharma companies does not call for disallowance.

It is pertinent to point out that the Hon'ble Supreme Court in case of M/s Apex Laboratories (which is otherwise distinguishable on facts) has ultimately upheld the validity of the CBDT circular which was considered by the assessing officer while concluding assessment proceedings for assessment year 2016-17. Even otherwise, the decision of Hon'ble Supreme Court in the case of Apex Laboratories is distinguishable on facts (as highlighted in the subsequent paras) which needs to be analysed/examined by the assessing officer. In the present case. it is reiterated that the assessing officer has failed to examine the nature of expenses incurred by the assessee and has proceeded to disallow the same on conjecture and surmises. Thus in larger interest of justice and to ensure that disallowance is only in accordance with law. it becomes necessary to examine the exact nature of the expenditure from all these angles discussed hereinabove. To facilitate the same. additional evidences are being placed by way of details/documents on sample basis. We crave leave to file more complete details/documents before AO if the verification aspect is set aside/ remanded to Ld. AO. Accordingly, it is respectfully prayed that the issue may kindly be remanded and AO may kindly be directed to verify/examine such details/documents for all the above aspects.

Detailed submission justifying each expense incurred by the Appellant not being violative of MCI Regulations and CBOT circular is submitted hereinbelow:

Travel & Conveyance

Appellant incurred Rs.11,04,735 on travelling and conveyance of doctors/ professors of high repute who have been hired by the Appellant as consultants to speak! make presentations at

the seminars/ conferences conducted by the Appellant on various topics. We wish to mention that these expenses are not violative of MCI regulations for the reasons highlighted herein below:

- *MCI regulations only covers the expenses incurred for medical professionals who are delegates and not those who act as guest speakers. Relevant portion of the Regulations (enclosed as Annexure 2 to application for admission of additional evidences @Pg 34-49) states as under:*

Travel Facilities - A medical practitioner shall not accept any travelfacility inside the country or outside, including rail, air. ship, cruise tickets, paid vacations etc. from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc as a delegate.

- *Travel and conveyance expense was incurred majorly for doctors. who are on the payroll of Appellant and a declaration from the Appellant confirming the same has been enclosed as Annexure 3 to application for admission of additional evidences @Pg 50.*

- *Considering the above, Appellant wishes to mention that any expenditure like travel etc incurred on doctors in the capacity of them being employees/ contractual service providers of the Appellant and not 'delegates' would not be violative of MCI regulations and deserves to be allowed as business expenditure.*

- *<u>Even otherwise,</u> Appellant also submits that travelling and accommodation facility is provided to certain doctors under agreement (apart from the employees) are not in the nature of freebies as the same have been incurred for availing the services of the doctors under a contractual obligation/ arrangement MCI regulation itself allows medical practitioners to work for pharmaceutical and allied healthcare industries in advisory capacities, as consultants and in doing so a medical practitioner should adhere to the certain guidelines/ safeguard. MCI regulations does not prohibit medical practitioners from accepting travel costs while acting as speakers/ consultants and providing consultancy services. Hence, CBDT Circular would not be applicable and provisions of section 37 of the Act cannot be invoked.*

- *In addition to the above. it may kindly be appreciated that the Appellant entered into an agreement with such doctors for availing professional! consultancy services under which apart from paying profession fee to such doctors. Appellant is also obliged to incur cost of travelling and accommodation. With regard to such arrangement/ expenses incurred. "it is submitted that such expenses would not come under the ambit of "freebies" as mentioned in IMC Regulations/ CBDT Circular, since such expenses have been incurred based on specific contractual arrangement entered with doctors and not given gratis to medical practitioners which alone is prohibited by IMC Regulations/ CBDT Circular. Even though the term "freebies" has not been defined under the Act, the same can be understood from common parlance as something that is given to another person for gratis without any obligation to incur such expense and without expecting any reciprocal service from the other person. Sample copies of agreements entered with doctors are enclosed as Annexure 4 to application for admission of additional evidences @; Pg 51-62.*

- *Considering that the doctors are hired as speaker/ consultant to provide presentations at the seminars/ conference conducted by the Appellant. the travel and accommodation expenses incurred by the Appellant while availing such services of doctors have been incurred in the course of conducting its normal business operations and hence. eligible for deduction under section 37 of the Act.*

Gifts & donations

- *Break-up of gifts & donations expense reveals that it includes the following expenses:*

Conference expense of INR 50,94,395
Publicity and literature expense of INR 22,19,264 and Other marketing expense of INR 38,25,933.

- *Conference expense includes expenses incurred on meals. accommodation, travel. conveyance. books and literature. sponsorship. audio visual set up hired. etc. On perusal of such details. it may kindly be appreciated that expenses in the nature of meals, accommodation, travel, conveyance,. etc. incurred on doctors are covered under the contractual agreement entered with them or are expenses incurred on employee doctors who are otherwise not covered within the prohibitions imposed under the MCI regulations. That apart. expenses in the nature of books, literature, sponsorship, audio visual set up, etc. are not incurred on any*

doctor in order to promote the Applicant's products. These expenses are incurred in the course of business and cannot be treated as freebies.

- *Publicity and literature expenses also includes webcast charges. which are not specifically prohibited under the MCI regulations. Sample copy of invoices are enclosed as Annexure 5 to application for admission of additional evidences @ Pg 63-64.*

- *In Appellant's own case for A Y 2011-12 (Page 816 to 859 of the paperbook) and AY 2012-13 (Page 860 to 881 of the paperbook). DRP has directed the learned AO to allow deduction of expenses pertaining to Publicity and Literature. basis the reason that such expenses are not specifically covered by the MCI Regulations (i.e. cannot be categorised as Gift. Travel facility. Hospitality. Cash or Monetary grant) and such expenses are required to be incurred by the Appellant so that the medical practitioners stay abreast of developments on various medicines manufactured/ sold by the Appellant and also the diseases which can be cured by such medicines.*

- *With regard to other marketing expense. we wish to mention that it majorly includes payments to State Chemist and Drug Association in the nature of Product Information Service Charge which is paid in order to publish the information on the Appellant's products and the payment is made based on the standard rates framed by these associations. We wish to submit that the above expenditure is not specifically prohibited in the MCI regulations.*

Even otherwise, expenses incurred by the assessee would not be hit by the decision of Hon'ble Apex Court in case of M/s Apex Laboratories Pvt. Ltd. v. DCIT (SLP No. 2320712019) which is distinguishable on facts.

Post issuance of directions dated 27.11.2014 by DRP and during the pendency of the present appeal before the Hon'ble Tribunal, Hon'ble Supreme Court in the case of Apex Laboratories Pvt Ltd. v. DCIT (2022] 135 taxmann.com 286, under the facts of that taxpayer, held freebies/gifts given to doctors to be not allowable under section 37 of the Act.

In this case, taxpayer gifted expensive gifts such as hospitality, conference fees, gold coins, LCD TVs, fridges, laptops, etc. to medical practitioners to promote its nutritional health supplement 'Zincovit'. In Appellant's case, the expenditure is towards contractual obligations with some

doctors for seeking their services in lieu of remuneration. In fact, in the agreement entered with the doctors. it is specifically mentioned that the latter will not prescribe Astra's products for gaining any business advantage for AstraZeneca (Refer Pg 52, 56, 60 of application for admission of additional evidence). It is settled law that decision of Courts has to be read in context of facts of the case. Expenses incurred in Appellant's case under a contractual obligation for receiving consultancy services of doctors are clearly distinguishable from facts of the case decided by Hon'ble Supreme Court (supra).

Expenses incurred by appellant when examined in context would be clearly not in violation of the regulations framed by the Medical Council. Accordingly, it is prayed that the same deserve to be allowed.

Ground of appeal no. 7: Without prejudice to the above, Amendment to IMC Regulations are not applicable prior to 10 December 2009

Hon'ble ITAT in Assessee's own case for A Y 2009-10 has held that no disallowances of expenditure incurred by the Assessee on doctors prior to the amendment of IMC regulations i.e. prior to 10 December 2009 can be made (Page 1251 of Legal Paperbook - IV)

Assessee submits that the CBDT Circular dated should not be applied retrospectively as the amendment to the IMC Regulations was effective from 10 December 2009. The break-up of expenses are as follows (refer page 1500 of Legal Paperbook Vol 5):

Particulars	Pre Amendment	Post Amendment	Total
Travel Conveyanc provided doctors	7,64,447	3,40,288	11,04,735
Conferen & Sympos and other marketing expenses	14,16,528	75,03,799	89,20,327
Publicity and	8,54,977	13,64,286	22,19,263
Total	30,35,953	92,08,373	1,22,44,3

Reliance in this regard is placed on the below decisions:

- *ACIT vs M/s. Geno Pharmaceuticals Limited (ITA No. 12/P J120 14) (Page 1088 of the Legal Paperbook - III)*
- *State of Bombay vs Vishnu Ramachandra (AI R 1961 SC 307) (Page 1094 of Legal Paperbook - Ill)*
- *Ritesh Aggarwal and Others vs SEBJ and Oth rs (2008 8 SCC*

205) (Page 1108 of Legal Paperbook - III)
- *CJ Paul and Others vs District Collector and Others (2009 14 SCC 564) (Page 1117 of Legal Paperbook - III)*

That apart. even if expenses incurred by the assessee during pre-amendment are directed to allowed. the expenses incurred post amendment would include expenses which are otherwise not violative of MCI Regulation as also CBDT circular for reasons already explained herein above. Therefore. same may kindly be directed to be allowed a deduction after examination by Ld. AO. In this regard. it is respectfully prayed that the issue of disallowance of expenditure incurred on doctors may kindly be restored to the file of assessing officer for fresh examination / verification."

17. The assessee has also filed additional evidence vide its application under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963. The additional evidence that is now sought to be admitted, according to the learned AR, provide for details of expenditure / break up incurred on the Doctors. It was submitted that the additional evidence being sought to be taken on record as it goes to the root of the dispute and for substantial justice, the same may be taken on record. In support of the additional evidence, the learned AR placed reliance on the following judicial pronouncements:-

a)Hon'ble High Court of Madhya Pradesh in the case of CIT v. Kum. Satya Setia (143 ITR 486), has held that under rule 29 of the Rules, it was within the discretion of the Tribunal to allow the production of additional evidence and even if there was a failure to produce the documents before the Income-tax Officer and the Appellate Assistant Commissioner, the Tribunal had the jurisdiction in the interest of justice to allow the production of such vital documents.

b)The Bangalore Tribunal in case of Tim ken Engineering & Research India (P.) Ltd v DCIT (ITA No. 974/ Bang/2008) relied on the above-mentioned decision.

c)In the case of Abhay Kumar Shroff v ITO (63 ITO 144), the

Hon'ble ITAT of Patna has held as follows:

"Tribunal Rules, 1963 discussed hereinbefore briefly. What I want to emphasize is that if the documents sought to be admitted even at the second appellate stage are of a nature and qualitatively such that they render assistance to the Tribunal in passing orders or required to be admitted for any other substantial cause, it would rather be the duty of the Tribunal to admit them. Learned Judicial Member has rightly made reference to the Tribunal's decision in Rajmoti Industries' case (supra) wherein on an analysis of various decisions, it was held that is the receipt or admission of additional evidence was vital and essential for the purpose of consideration of the subject-matter of appeal and arrive at a final and ultimate decision, the Tribunal was amply empowered to admit additional evidence under rule 29 referred to supra." (emphasis supplied).

The Hon'ble ITAT of Delhi in the case of Sikander Publishing (P) Ltd vs DCIT (81 TTJ 249), held that, if the evidence is genuine, reliable and proves the assessee's case, then the assessee is not to be denied the opportunity to produce the same before the appellate authority, as an additional evidence."

18. The learned DR, on the other hand, submitted that the issue raised is squarely covered by the judgment of the Hon'ble Apex Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT (supra). The learned DR, however, submitted that since the detailed break-up of the expenses has been given, the matter may be restored to the A.O. to examine whether such expenditure incurred by the assessee is violative of the provisions of MCI Regulation and the dictum laid down by the Hon'ble Apex Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT (supra).

19. We have heard rival submissions and perused the material on record. The assessee has filed additional evidence under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 for admission of additional evidence. The additional evidence is details of break-up of expenses, such as travelling, conveyance, gift and donations provided to Doctors aggregating to Rs.1,22,44,326. It was stated that though the assessee had submitted before the lower authorities such details, were not segregated under various heads. It is pertinent to note that prior to the judgment of the Hon'ble Apex Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT (supra), many of the judicial pronouncements had held that MCI Regulations are not applicable on pharmaceutical companies and expenses incurred by such companies are not violative of CBDT Circular. During this phase of assessment, there were only adhoc summary basis evaluation of expenditure. In the present case also there is no critical evaluation of the expenses and post the Hon'ble Supreme Court judgment, the dictum laid down, same needs to be followed and each of the expenditure needs to be evaluated to see if the disallowance is justified. It is also important to note that for the assessment year 2016-2017, the A.O. had raised query in relation to the expenditure incurred on the Doctors by the assessee. The assessee filed detailed response to such notice and the A.O. after analyzing the nature of expenses (which is claimed by the assessee similar to the expenditure incurred for the relevant assessment year) in the context of MCI Guidelines and CBDT Circular No.5/2012 dated

01.08.2012 accepted the claim of the assessee. Copy of the order in assessee's own case for assessment year 2016-2017, is placed on record as additional evidence. Therefore, it was claimed that even if the criteria as laid down in CBDT Circular and also the MCI Regulation (as now affirmed by the Hon'ble Apex Court is applied), the expenditure incurred towards contractual obligation with Doctors and employees of pharmaceutical companies does not call for disallowance. In the present case, the A.O. had primarily made disallowance by referring the CBDT Circular No.5/2012 dated 01.08.2012. The A.O. has not critically examined the nature of expenditure incurred by the assessee. In the larger interest of justice, in view of the latest judgment of the Hon'ble Apex Court, which has examined the very same issue, it becomes necessary to examine the exact nature of expenses incurred by the assessee for Doctors from all angles. Therefore, for substantial question and cause, the additional evidence are taken on record. Since the additional evidence is taken on record, necessarily, the matter needs fresh verification by the A.O., especially in the light of the recent judgment of the Hon'ble Supreme Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT (supra). For the aforesaid purpose, the issues raised in grounds 4 to 8 are allowed for statistical purposes. It is ordered accordingly.

Ground 10 and 11 (TP Adjustment)

20. In ground 10, the issue raised is with reference to re-characterization of assessee as a clinical research

organization by the TPO. In ground 11, the assessee challenges reimbursement of expenses in the cost base for the purpose of mark up. In paragraph 13 of this order, we have dismissed the Revenue's appeal. Consequently, the transfer pricing adjustment has been deleted. Therefore, we find grounds 10 and 11 raised in assessee's appeal is only academic and we dismiss the same.

Ground 14 to 14.3 (Additional Ground)

21. The above ground relates to the claim of the assessee that dividend distribution tax should be confined to the rate as per DTAA for dividend distributed to non-resident assessee. The learned AR submitted that the assessee has raised the above ground on the basis of the order rendered by the Delhi Bench of the Tribunal. However, the learned AR fairly submitted that this issue has been referred to the Special Bench and accordingly pleaded that this claim of the assessee may be restored to the A.O. with the direction to follow the decision that may be rendered by the Special Bench in future.

22. We have heard rival submissions and perused the material on record. Having regard to the submission made by the learned AR, we restore this issue to the files of the A.O. with the direction to follow the decision that may be rendered by the Special Bench of the Tribunal on this issue, in due course. It is ordered accordingly.

23. In the result, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on this 14th day of October, 2022.

Sd/-	**Sd/-**
(Padmavathy S)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 14th October, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The DRP-1, Bengaluru.
4. The CIT (LTU), Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore