

IN THE INCOME TAX APPELLATE TRIBUNAL "G"
BENCH, MUMBAI
BEFORE SHRI R.C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.80/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

ACIT-9(3)(2) 418, Aayakar Bhavan, 4 th Floor, M.K. Marg, Mumbai- 400020	<u>बनाम/</u> Vs.	M/s. Galderma India Pvt. Ltd. 23, 2 nd Floor Steelmade Indl. Estate, Marol Village Andheri (East), Mumbai- 400059
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ITA. No. 138/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

Galderma India Pvt. Ltd. Lotus Corporate Park, D wing, Unit 801 & 802, Graham Firth Steel Compound, Western Express Highway, Goregaon East, Mumbai 400063.	<u>बनाम/</u> Vs.	DCIT 8(1) Aayakar Bhavan, M.K. Road, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACG8660M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by:	Shri V. Vidhyadhar
Assessee by:	Ms. Krupa R. Gandhi

सुनवाई की तारीख / Date of Hearing: 03.01.2018
घोषणा की तारीख /Date of Pronouncement: 02.04.2018

आदेश / ORDER

PER AMARJIT SINGH, JM:

The Revenue as well as assessee have filed the above mentioned appeals against the order dated 30.10.2015 passed by the Commissioner of

Income Tax (Appeals)-16, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2011-12.

ITA NO. 80/M/2016

2. The Revenue has filed the present appeal against the order dated 30.10.2015 passed by the Commissioner of Income Tax (Appeals)-16, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2011-12.

3. The Revenue has raised the following grounds: -

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in admitting additional evidences in contravention of the provisions of Rule 46A of the I.T. Rules in as much as no opportunity of being heard was provided to the AO and in giving consequential benefit of Rs.97,93,996/- held as allowable u/s 37(1) of the Act out of the disallowance of business promotion expenses made by the AO.”
The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the ACIT9(3)(2) be restored.
The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”

4. The brief facts of the case are that the assessee filed its return of income on 30.09.2011 declaring total income to the tune of Rs.6,80,98,658/-. Thereafter, the assessee filed the revised the return of income on 14.12.2012 declaring total income to the tune of Rs.6,89,93,188/-. The assessee in its revised return of income declared the book profit to the tune of Rs.5,95,48,173/-. The return of income was duly processed u/s 143(1) of the I.T. Act. 1961. The case was

selected for scrutiny assessment, therefore, notice u/s 143(2) of the Act was issued to the assessee company on 08.09.2012 and 30.07.2013 which were also served upon the assessee. The assessee company was engaged in the business of marketing and trading of dermatology products. The assessee claimed the selling and distribution expenses to the tune of Rs.14,06,32,438/- the breakup is hereby mentioned below as under:-

Sales Promotion	78094609
Field Staff Expenses	26603808
Training and meeting expenses	9775934
Commission costs	19148831
Freight & forwarding expenses	7009256
Total	140632438

5. The notice was given to the assessee to substantiate his claim and after examine the claim of the assessee, the claim of the assessee was not found justifiable under Explanation to Section 37(1) of the Act on following categories: -

Category	Amount	Nature of expense
Continued medical education	270520	These expenses are incurred for continuing medical education that helps those in the medical field to maintain <u>competence and learn about new and developing areas of their field</u> . The assessee has incurred a sum of Rs.1,02,324/-, which is

		shown to have been reimbursed to Swiss Biogenics Limited towards Galderma Annual Symp 2010 expenses in Colombo, Srilanka. Further, the assessee has incurred a sum of Rs.1,03,846/- at Hyatt Regency, Delhi <u>for medical education</u> conference; and other expenses of Rs.64,350/-. Thus, these come within the mischief of the IMP Regulations.
P,G. Grant	1230833	It is incurred to provide a fixed grant to PG students presenting posters at the National Conference- It is not a business related activity. Thus, it comes within the mischief of the IMC Regulations
Indian Acne Alliance	561172	It is incurred on group of doctors practicing in Dermatology. Thus, this expenditure comes within the mischief of the IMC Regulations.
Doctors Group meeting	1154265	It is incurred to fund the educational programs in the field of dermatology. This expenditure comes within the mischief of the IMC Regulations.
Post marketing survey(PMS)	4167000	It is incurred for documenting the obtained from registered practitioners. Thus, this expenditure comes within the mischief of the IMC Regulations

IADVL New Year	3112488	These expenses are incurred for attending the congress and stall participation, it is the payment made to medical practitioners their professional association for attending IADVL. Thus, this expenditure comes within the mischief of the IMC Regulations.
IADVL	2762350	
Stata IADVL	1486648	
Other conference	2432510	It is the payment made to medical practitioners/ their professional association for attending the congress and stall participation. This expenditure comes within the mischief of the IMC Regulations.
Sponsorship local	2770809	The sum of Rs.27,70,809/- has been incurred on purchase of test kits instruments, which are given to the Doctors. Thus, this expenditure comes within the mischief of the IMC Regulations.
Samples	94,29,850	The expenditure of Rs.18879699 is incurred on manufacture of samples of the company's products, which are given to medical practitioners. As per the assessee, it has incurred this expenditure towards the samples as given to the 600 stockists and the medical practitioners. However, the issue is squarely covered by the CBDT circular because professional autonomy is compromised of the doctor by accepting the free samples from the assessee company. Hence considering the written submission of the assessee the disallowance is restricted to the 50% of the samples

		cost ie Rs.94,29,850/-
Total	2,93,78,445	

6. The assessee also claimed the provision of Rs.44,61,914/- for damage/expired goods assuming the contingent liability. The claim of the damage for /expired goods to the tune of Rs.44,61,914/- was disallowed and added to the income of the assessee. The income of the assessee was assessed to the tune of Rs.10,30,96,510/- and book profit u/s 115JB of the Act was assessed to the tune of Rs.7,03,96,640/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) and the CIT(A) allowed the claim u/s 37(1) of the Act to the tune of Rs.97,93,996/-, therefore, the revenue has filed the present appeal before us.

ISSUE NO. 1:-

7. Under this issue the revenue has challenged the allowance of expenses of Rs.97,93,996/- which was disallowed by the AO in view of the Explanation-1 to Section 37(1) of the Act. Before discussing further, it is necessary to advert on the record that the assessee claimed the sale promotion expenses to the tune of Rs.2,93,78,445/- under heads. The details of which are hereby given below: -

Sr. No.	Particulars	Amount Claimed	Amount disallowed

1	Continued Medical education	2,70,520	2,70,520
2	PG Grant	12,30,833	12,30,833
3	Indian Acne Aliance	5,61,172	5,61,172
4	Doctor Group Meeting	11,54,265	11,54,265
5	Post Marketing Survey PMS	41,67,000	41,67,000
6	IADVL New Year	31,12,488	31,12,488
7	IADVL	27,62,350	27,62,350
8	State IADVL	14,86,648	14,86,648
9	Other conference	24,32,510	24,32,510
10	Sponsorship Local	33,04,660	27,70,809
11	Samples	1,88,59,699	64,29,850
12	Payment to doctors	2,62,963	2,62,963
	Total		2,93,78,445

8. After the appraisal of the order of the CIT(A), we noticed that the CIT(A) was of the view that an amount of Rs.97,93,996/- incurred in connection with installation of stall and participation fees are allowable and the remaining expenses to the tune of Rs.1,98,47,412/- was not allowable in view of the Explanation-1 of Section 37(1) of the Act, 1961. Before going further, we deemed it is necessary to advert the finding of the CIT(A) on this issue on record: -

“4.3.4. Since the issue involved has been already adjudicated by Hon'ble ITAT, therefore respectfully following the judgment of Hon'ble ITAT, addition of Rs*44,61,914/- made on account of

disallowance of deduction claimed on account of provision for damaged/ expired goods, is deleted.

4 A Ground No. 4 & 7

4.4.1. By raising these grounds, assessee company has agitated against disallowance of a sum of Rs.2,96,41,408/- from sales promotion expenses.

4.4.2. In para 3 of the assessment order, the Ld. AO observed that in the P&L account for the year under consideration, the assessee has adjudicated the sum of Rs. 14,06,32,438/- as sales and distribution expends. The AO has relied upon the amendmend made in the Indian Medical Council Act, wherein clause 6.8 was inserted w,e.f 10,12.2009. Clause 6.8 introduced a code of conduct for doctors and professional association of doctors in their relationship with pharmaceutical and allied health sector industry. According to this clause, a medical practitioner shall not:

- a. Receive any gift from any pharmaceutical or allied, health care industry and their sales people or representatives;
- b Accept any travel facility inside the country or outside, including rail, air, ship, cruise tickets, paid vacations etc from any pharmaceutical or allied health care industry or their representative for self and family members for vacation or for attending conferences, seminars, workshops, CME program me etc as a delegate;
- c. Accept individually any hospitality like hotel accommodation for self and family members under any pretext;
- d. Receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext.

4.4.3. It was pointed out by the AO that after introduction of above mentioned amendment, the pharmaceutical companies including the assessee company were prohibited to make such payments mainly for the purpose of maintaining professional autonomy as contained in clause 6.8.1 of this EMC Regulations. During assessment proceedings, the l_d. AO called the details of expenses incurred on sale promotion and found that expenditure of Rs.2,96,41,408/- claimed under the name and styles of sales promotion expenses had been incurred directly or indirectly by assessee company for doctors, their professional associates by way of giving away freebies which was against the public policy and prohibited by the law. Therefore, it was not a allowable deduction

as per explanation to Section 37(1) of the Income Tax Act, 1961 and it was added to the total income of the assessee.

4.4.4. During appellant proceedings, a bifurcation of the expenses disallowed by the Ld. AO was once again submitted before me. The details of which are given as under: -

Sr. No.	Particulars	Amount Claimed	Amount disallowed
1	Continued Medical education	2,70,520	2,70,520
2	PG Grant	12,30,833	12,30,833
3	Indian Acne Aliance	5,61,172	5,61,172
4	Doctor Group Meeting	11,54,265	11,54,265
5	Post Marketing Survey PMS	41,67,000	41,67,000
6	IADV L New Year	31,12,488	31,12,488
7	IADV L	27,62,350	27,62,350
8	State IADV L	14,86,648	14,86,648
9	Other conference	24,32,510	24,32,510
10	Sponsorship Local	33,04,660	27,70,809
11	Samples	1,88,59,699	64,29,850
12	Payment to doctors	2,62,963	2,62,963
	Total		2,93,78,445

4.4.5. During appellate proceedings, the *Ld.* A.R. admitted that expenses claimed against Continued Medical education Rs.2,70,520 /-, P.G. Grant Rs. 12,30,833/-, Indian Acne Aliance-Rs.5,61,172/-, Doctor Group Meeting- Rs,11,54,265/-, Post Marketing Survey PMS- Rs.41,67,090/-, Sponsorship, Local- Rs, 27,70,809/-, Samples- Rs. 94,29,850 /-, and payments to doctors- Rs.2,62,963/- totaling to Rs.1,98,47,41 2/~ were incurred directly

or indirectly on doctors or their associations and no arguments were put forward regarding disallowance of the same made by the AO- As mentioned by the AO in the assessment order, these payments were made in contravention to Explanation (1) to Section 37(1) of the Income Tax Act. There is a clear cut violation of Indian Medical Council Act, a law of land passed by the Parliament. The Hon'ble High Court of Allahabad has considered the similar issue in the case of CIT vs. PI, Vishwanath Sharma (2009) 316 1TR 0419,

4.4.6. The Hon'ble Court has considered the issue relating to payment of commission to Government doctors for prescribing medicines manufactured by the assessee being illegal gratification. The relevant part of Hon'ble High Court judgment is reproduced as under: -

“Sec. 37(1) allows an expenditure wholly and exclusively incurred for the purpose of the business or the profession in computing the income chargeable under the head profit or gains of business or profession. The Explanation thereof disallowed an expenditure which is incurred by an assessee for *which is an offence or which is prohibited by law. The Explanation thus makes it dear that such an expenditure shall not be treated to be a business or professional expenditure, it is not in dispute behaved the parties and the counsel for the assessee also did not dispute that a Government servant is not entitled to receive any amount in consideration of discharge of his official duty unless provided/permitted the rules and regulations applicable to his conditions of service. The Government doctors were not entitled to realize \$such amount for the purpose of prescribing medicines of the petitioner and thereby promoting his business interest. The amount paid to the Government doctors by the assessee dearly comes within the category of "illegal gratification." or "bribe". It is also not in dispute that an illegal gratification or bribe is an offence under Prevention of Corruption Act, 1988. Earlier an offence under s. 161 IPC The conduct rules applicable to Government servant also prohibit such realization of money by the Government servant and any amount, so received by such Government servant, is a serious misconduct. Without going to the question as to whether the payment paid as 'commission to Government doctors is moral or immoral, there is no manner of doubt that the commission paid to Government doctors is an offence in law. Both the persons, namely, one is tendering or*

accommodation to doctors or any other favours to doctors. Necessary bills and vouchers relating to above mentioned expenses were also produced during course of appellate proceedings. These expenses incurred were exclusively for participation fee and installation of stall which are not prohibited by the Indian Medical Council Act Therefore, provisions of Explanation -1 to Section 37(1) will not be applicable in respect to payments of Rs.97,93,996/-. Keeping in view the facts of the case, expenditure for an amount of Rs.97,93,996/- incurred in connection with installation of stall and participation fees are allowed and expenses of Rs.1,98,47,412/-incurred for giving various direct & indirect favour & to doctors and their associations were not allowed u/s, 37(1) of the Income Tax”

9. On appraisal of the above mentioned order, we noticed that the CIT(A) disallowed the claim of the assessee on the basis of the decision of Hon’ble High Court of Allahabad in the case of **CIT Vs. PT. Vishwanath Sharma (2009) 316 ITR 0419** and on the basis of the Circular No.5 of 2012 dated 01.08.2012 issued by the Central Board of Direct Taxes, New Delhi vide F.No.225/142/20120-ITA-11. The contention of the Ld. Representative of the assessee is that the judgment passed by the Hon’ble High Court Allahabad in the case of **CIT Vs. PT. Vishwanath Sharma (2009) 316 ITR 0419** is connection with the payment of commission whereas the factual position in the present case is totally different which nowhere deals the commission paid to the doctor. It is also contended that the present assessment year is the A.Y. of 2011-12 and the Circular No.5 of 2012 dated 01.08.2012 issued by the Central Board of Direct Taxes, New Delhi vide F.No.225/142/20120-ITA-11 is prospective in nature and is not liable to be applicable in the case of the assessee retrospectively.

In this regard, the Ld. Representative of the assessee has placed reliance upon the law settled in **DCIT Vs. PHL Pharma (P.) Ltd. (2017) 163 ITD 10 (Mum. Trib.)**, **macleods Pharmaceuticals Ltd. Vs. ADIT (2016) 161 ITD 291 (Mum. Trib.)**, **Syeom formulations India Ltd. (ITA No. 6429/M/2012 (Mum. Trib.) & UCB India Pvt. Ltd. Vs. ITO (ITA No. 6681 & 5454/M/2013) (Mum. Trib.)** However, on the other hand, the Ld. Representative of the Department has refuted the said contention. The assessee raised the claim of sale promotion expenses which has been declined fully by the Assessing Officer while passing the order dated 08.03.2014. However, the CIT(A) allowed the claim of the assessee to the extent of Rs.97,93,996/- which was belonging to the payment made to IADVL New Year of Rs.31,12,488/-, IADVL of Rs.27,62,350/-, State IADVL of Rs.14,86,648/- and other conference of Rs.24,32,510/- total to the tune of Rs.97,93,996/-. The CIT(A) was of the view that these fees are for participation fees and installation of stall which was not prohibited by the Medical Council Act. So far as the remaining claim of the assessee is in connection with the expenses of Rs.1,98,47,412/- is concerned, the claim of the assessee is that the said expenses is not required to be allowed on the basis of the Circular No.5 of 2012 dated 01.08.2012 issued by the Central Board of Direct Taxes, New Delhi vide F.No.225/142/20120-ITA-11 which was prospective in nature. It is not in dispute that the present assessment year is for the A.Y. 2011-12 Circular No. 5 and of 2012 dated 01.08.2012 issued by the Central

Board of Direct Taxes, New Delhi vide F.No.225/142/20120-ITA-11 and was applicable prospectively for the A.Y. 2013-14 onwards. As discussion above, the order passed by the Allahabad High Court (supra) is only deals with the commission expenses whereas no such issue is in question in the present case. Now, coming to the applicability of the circular dated 01.08.2012 is concerned, we are of the view that the same is not applicable retrospectively and in this regard we are also finding support in law settled in **DCIT Vs. PHL Pharma (P.) Ltd. (2017) 163 ITD 10 (Mum. Trib.)**, **macleods Pharmaceuticals Ltd. Vs. ADIT (2016) 161 ITD 291 (Mum. Trib.)**, **Syeom formulations India Ltd. (ITA No. 6429/M/2012 (Mum. Trib.)** & **UCB India Pvt. Ltd. Vs. ITO (ITA No. 6681 & 5454/M/2013) (Mum. Trib.)**. Accordingly, we are of the view that the expenses are allowable, therefore, we decide this issue in favour of the assessee against the revenue.

ITA NO. 138/M/2016

10. The assessee has filed the present appeal against the order dated 30.10.2015 passed by the Commissioner of Income Tax (Appeals)-16, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2011-12.

11. The assessee has raised the following grounds: -

“The Ld. CIT(A) erred in law in disallowing a sum of Rs.1,98,47,412 from Sales Promotion expenses.

The appellant prays that the order of the Ld. CIT(A) be set aside and be directed to allow the Sales Promotion expenses of Rs.1,98,47,412/-.

The appellant craves leave to add, to alter and or amend the ground of appeal as and when directed.”

12. The facts of the present case are the same as mentioned in the appeal no 80/M/2016 above, therefore, there is no need to repeat the same. However, the figure is different.

13. The matter of controversy is also the same. The claim of the assessee has been allowed in ITA. No.80/Mum/2016, therefore, in the instant case wherein the matter of controversy is also the same, the claim of the assessee is hereby ordered to be allowed in the above stated terms.

14. In the result, the appeal filed by the assessee is hereby ordered to be allowed and the appeal of the revenue is hereby dismissed.

Order pronounced in the open court on 02.04.2018.

Sd/-

(R. C. SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai दिनांक Dated : 02.04. 2018

Vijay

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**