

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "I", MUMBAI  
BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.6244/Mum/2017 (Assessment Year- 2012-13)

ITA No.6245/Mum/2017 (Assessment Year- 2013-14)

ICPA Health Products Ltd., Off. 216-219, Adarsh Industrial Estate, Sahar Road, Chakala, Andheri(E), Mumbai-400099 <b>PAN: AAAC13042F</b>	<b>Vs.</b>	Deputy Commissioner of Income tax, Circle-10(1)(1), Mumbai, Room No. 702, C-10, Praytaksha Kar Bhavan, BKC, Mumbai-400051
(Appellant)		( Respondent)

Assessee by : Sh. Yogesh Thar AR

Revenue by : Sh. V. Justine Sr DR

Date of hearing : 07.03.2018

Date of Pronouncement : 20.04.2018

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. These two appeals by assessee under section 253 of Income tax Act are directed against the separate order of Commissioner (Appeals)-17, Mumbai, dated 25.07.2017 for assessment year 2012-13 and 2013-14. In both the appeals the assessee has raised identical grounds of appeal except variation of figure of disallowance, on the request of assessee both the appeals were clubbed, heard together and is decided by consolidated order to avoid the conflicting decision. Both the parties argued the appeal for assessment year 2012-13 as lead case. In appeal for assessment year 2012-13 the assessee has raised following grounds of appeal;

- (1) *On the facts and in the circumstances of the case and in law, the learned Commissioner of income tax (Appeals) erred in upholding the disallowance of sale promotion expenses amounting to Rs. 33,76,162 /- under section 37(1) of the Act.*
2. Brief facts of the case are that Assessee Company is engaged in the business of manufacturing of Pharmaceuticals product and in Oral care products. The assessee filed its return of income for assessment year 2012-13 on 26<sup>th</sup> September 2012 declaring total income of Rs. 8,95,10,543/-. The assessment was completed on 25<sup>th</sup> February 2015 under section 143(3). The assessing officer while passing assessment order made the disallowance of sale promotional expenses of Rs.33,76,162/-. On appeal before Commissioner (Appeals) the disallowance of sale promotional expenses, made by assessing officer was confirmed. Thus, further aggrieved by the order of Commissioner (Appeals) the assessee has filed present appeal before us.
3. We have heard the ld. AR of the assessee and ld. Sr. DR for the revenue and perused the material available on record. The ld. AR of the assessee submits that Assessee Company is engaged in the business of manufacturing of Pharmaceuticals and trading in Oral health care products. During the assessment year under consideration the assessee debited Rs.1,67,59,406/- in its profit and loss account as sale promotional expenses. Out of the total sales promotion expenses the assessing officer disallowed expenses of Rs.33,76,162/- under section 37 of the Act. The

disallowance was made on the ground that the payment made by assessee is covered by Circular No.5/2012 issued by CBDT. The said Circular is not applicable on the Pharma Companies like assessee and otherwise would be applicable prospectively. The Id. AR submits that the expenses incurred by the assessee on sale promotion expenses are allowable business expenditure. The expenses are such that the same would not be considered for the purpose which is an 'offence' or which is 'prohibited by law' according to the explanation attached with section 37(1) of the Act. The Id AR submits that the assessee incurred expenses on the following items;

Serial No.	Date	Particular of expenses	Amount in Rs
1	30/04/2011	Set of 4 glasses @ 275 per set for Thermoseal	12,99,375/-
2	02/05/2011	Disposable face mask (Set of 25) @ 40 per set	2,31,000/-
3	21/05/2011	Pen with name of the products (Thermoseal and Hexidine) embossed on it @ 25.5 per pen	3,34,688/-
4	09/06/2011	Doctor writing pad @ 24 per unit	69,023/-
5	25/07/2011	Pen with name of the products (Thermoseal and Hexidine) embossed on it @ 35.40 per pen. Chemist order book as per the specification @ 43.25/- per unit	2,02,345/-
6	25/07/2011	Towel Set for products Hexigel and Mucopain name inscribed on it @ 124 per set	4,55,700/-
7	03/09/2011	Towel set @ 60/- per set	300/-
8	03/10/2011	Payment for certain sale promotion activities	7,000/-
9	15/10/2011	Wall Clock with the product name inscribed on it @ 147 per unit	1,49,625/-
10	29/10/2011	Pen with the product name Moyzen inscribed on it	1,51,594/-
11	09/11/2011	Purchase of Voltas Cooler and Stabilizer	29,990/-
12	11/11/2011	Payment for certain sale promotion activities	5,000/-
13	18/11/2011	Wall Clock with product name inscribed on it @ 133 per unit	2,24,438/-
14	21/11/2011	Paper Cups @ 1.02 per piece	2,11,094/-
15	31/03/2012	Payment for certain sale promotion activities	5000/-
		<b>Total</b>	<b>33,76,162/-</b>

4. It was submitted that the item distributed were not of high value items. All the invoices of these items were provided to the assessing officer. No high value items were distributed having high value e.g. TV, Computer and Mobile Phone etc. These items were distributed to the Medical practitioner with the motive to re-call the product. Such promotional material cannot be considered as gift or expenses prohibited by law. Such a small gift bearing company's logo does not tantamount to giving gift to Doctors. In fact is an advertisement and is fully allowable as advertisement expenditure. Moreover, the sale promotional expenses incurred by the assessee are only .5% of total turnover of the assessee. The similar expenses was disallowed by assessing officer in earlier assessment year for 2010-11 and in 2011-12 and on appeal before Commissioner (Appeals) the expenses were allowed, the revenue has not filed appeal before the Tribunal. The Id AR for the assessee in his first proposition of law submits that Indian Medical Council Regulations are not applicable on the assessee and are applicable to the Doctors. In support of his submissions the Id AR for the assessee relied on the decision of Delhi High Court in Max Hospital Vs Medical Council of India (WC (C) 1334/2013) and decisions of Mumbai Tribunal in DCIT Vs PHL Pharma Ltd (78 taxmann.com36)(Mum.) and Sanjay Pharma India Ltd Vs PCIT( 89 taxmann.com249).

5. For second proposition the ld AR for the assessee submits that expenses incurred for sale promotion and advertisement and not for the purpose of distributing the gift, the ld AR for the assessee relied on the decisions of Calcutta High Court in Indian Oxygen Ltd Vs CIT (210 ITR 274) (Cal), CIT Vs Dabur Pvt Ltd (250ITR 301)(Kol), decision of Tribunal in ACIT Vs Dupen Laboratories Private Ltd (ITA No.5195/M/2013), Macleod's Pharmaceuticals Ltd Vs ACIT (taxmann.com250) and Syncom Formulation Ltd Vs DCIT (ITA No.6429/M/2012). In support of legal submissions that the Circular No.5/2012 is prospective in nature, relied on the decision of DCIT Vs PHL Pharma Ltd (supra), Macleod's Pharmaceuticals Ltd Vs ACIT (supra), Syncom Formulation Ltd Vs DCIT (supra), UCB India Pvt Ltd Vs ITO (ITA No. 6681&6454/Mum/2013 (Ahd) and assessee's own case in Commissioner (Appeals) order for assessment year 2010-11and 2011-12.
6. On the contrary the ld. DR for the revenue strongly supported the order of the authorities below. The ld. DR submits that Medical Council of India is a regulatory body constituted under Medical Council Act, which has prohibited the Doctors and medical practitioners from taking any gifts, or any items from the Pharma Companies. The claim of the assessee is in clear violation of the statutory guidelines framed by Medical Council of India and the CBDT Circular No. 5, dated 01.08.2012.

7. We have considered the rival submissions of the parties and have gone through the orders of the authorities below and the material placed before us. The assessing officer during the assessment proceedings noted that the assessee has debited Rs.1,71,30,751/- as sale promotion expenses. On examining the details of such expenses the assessing officer took the view that out of this expenses Rs.33,76,162/- has been incurred for the purpose of giving gifts to the Doctors. The said gift is in violation of Indian Medicine (standard of professional conduct, etiquette and code of ethics) Regulation,2002 and the CBDT Circular No.5 of 2012, dated 01.08.2012 and therefore, disallowed under section 37(1)of the Act. Before the Id CIT(A) the assessee filed the details of the cost of the items which were disallowed by the assessing officer and explained that the expenditure incurred by assessee is allowable. The assessee contended that the expenditure is incurred for the purpose of advertising of the product and not for the purpose of gift. The details of the items were also provided (which we have refereed supra). The assessee also relied on the order of Id. Predecessor of CIT(A), for assessment year 2010-11 and 2011-12. The Id CIT(A) not followed the order of his predecessor taking his view that his predecessor was not having the benefit of CBDT Circular No.5 of 2012, which is clarificatory in nature. The Id CIT(A) on relying the decision of Kerala High Court in CIT Vs Moidu's Medicare (P) ltd 76taxmann.com

309(Ker), Punjab & Haryana High Court in Kap Scan and Diagnostic Centre (P) Ltd [2012] 25 taxmann.com 92 (P&H), Himachal High Court in Confederation of Indian Pharmaceutical Industry Vs CBDT [2014] 44 taxmann.com 365 (HP) and Tribunal's decision in Apex Laboratory (P) ltd Vs ACIT [2017] 80 taxmann.com 236, TTK Healthcare Ltd [2017] 78 taxmann.com 86 (both Chennai Tribunal), Liva Health Care Ltd (2016) 83 taxmann.com 171(Mumbai Tribunal) confirmed the action of the assessing officer. The Id CIT(A) also differentiated the ratio in DCIT Vs PHL Pharma (P) Ltd (2017) 78 taxmann.com 36.

8. We have noted that the facts of the case law relied by Id CIT(A) in CIT Vs Moidu's Medicare (P) ltd (supra) are quite different, in the said case the assessee claimed to have paid commissions to the Doctors and could not substantiate its claim and even not disclosed the names of the persons to whom such commission was paid. The decision in case of Kap Scan and Diagnostic Centre (P) Ltd (supra) and in Confederation of Indian Pharmaceutical Industry Vs CBDT (supra) was considered and differentiated by Mumbai Tribunal in DCIT Vs PHL Pharma(P) Ltd, which we shall refered in preceding paras. In Apex Laboratories (P) Limited Vs ACIT (supra) the assessee in that case had given Gold Coin to Doctors and Medical practitioner. Similarly, in case of TTK Health care gifts were given to the Doctors. However, the facts of the instant case are

quite different. In the instant case the assessee has claimed that they have distributed glass, face mask, pen, writing pad, towel set, wall clock, paper cups and one Voltas Cooler and stabilizer. In our view except Voltas Cooler and stabilizer all the items cannot be regarded as freebies given to the Doctors. We are in full agreement with the contention that these items are purely for brand recognition. The Id AR for the assessee heavily relied on the decision of Mumbai Tribunal in DCIT Vs PHL Pharma (P) ltd, wherein the coordinate bench while considering expenditure incurred almost on identical items held :

“5. We have considered the rival contentions made by Id. CIT DR as well as Id. Sr. Counsel, Mr. J.D. Mistry, perused the relevant finding given in the impugned orders and material referred to before us. The entire controversy revolves around, whether the expenditures in question incurred by the assessee (a pharmaceutical company) is hit by Explanation 1 below section 37(1) in view of CBDT Circular dated 01.08.2012, interpreting the amendment dated 10.12.2009 brought in Indian Medical Council Regulation 2002 or not. The break-up of sales promotion expenses, which has been disallowed by the AO, are as under:

<i>Sr. No.</i>	<i>Particulars of expenses</i>	<i>Amount (in Rs.)</i>
1	Customer Relationship Management expenses (CRM)	7,61,96,260
2	Key Account Management expenses (KAM)	2,56,68,509
3	Gift Articles	9,20,22,518
4	Cost of samples	3,60,85,320
	Total	22,99,72,607

The nature of aforesaid expenses has already been explained above. Now whether the nature of such expenditure incurred by the assessee is to be disallowed in view of the CBDT Circular dated 01.08.2012. For the sake of ready reference, the said CBDT Circular No.5/2012 is reproduced hereunder:

**"INADMISSIBILITY OF EXPENSES INCURRED IN PROVIDING FREEBEES TO MEDICAL PRACTITIONER BY PHARMACEUTICAL AND ALLIED HEALTH SECTOR INDUSTRY**

Circular No. 5/2012 [F. No. 225/142/2012-ITA.II], dated 1-8-2012

It has been brought to the notice of the Board that some pharmaceutical and allied health sector Industries are providing freebees (freebies) to medical practitioners and their professional associations in violation of the regulations issued by Medical Council of India (the 'Council') which is a regulatory body constituted under the Medical Council Act, 1956.

2. The council in exercise of its statutory powers amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposing a prohibition on the medical practitioner and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector Industries.

3. Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those falling under sections 30 to 36) from the business Income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this subsection denies claim of any such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law.

Thus, the claim of any expense incurred in providing above mentioned or similar freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section 37(1) of the Income Tax Act being an expense prohibited by the law. This disallowance shall be made in the hands of such pharmaceutical or allied health sector Industries or other assessee which has provided aforesaid freebees and claimed it as a deductible expense in its accounts against income.

4. It is also clarified that the sum equivalent to value of freebees enjoyed by the aforesaid medical practitioner or professional associations is also taxable as business income or income from other sources as the case may be depending on the facts of each

case. The Assessing Officers of such medical practitioner or professional associations should examine the same and take an appropriate action.

This may be brought to the notice of all the officers of the charge for necessary action."

From the perusal of the aforesaid Board Circular, it can be seen that heavy reliance has been placed by the CBDT on the Circulars issued by the Medical Council of India, which is the regulatory body constituted under the 'Medical Council Act, 1956'. One such regulation has been issued is "Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002". 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 clause 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. The said clause reads as under:—

"6.8 Code of conduct for doctors and professional association of doctors in their relationship with pharmaceutical and allied health sector industry.

6.8.1 In dealing with Pharmaceutical and allied health sector industry, a medical practitioner shall follow and adhere to the stipulations given below:

- (a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives.
- (b) Travel facilities: A medical practitioner shall not accept a any travel facility 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.
- (c) Hospitality: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext.
- (d) Cash or monetary grants: A medical practitioner shall not receive any cash or monetary grants from any

pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law / rules / guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed.

- (e) Medical Research: A medical practitioner may carry out, participate in work, in research projects funded by pharmaceutical and allied healthcare industries. A medical practitioner is obliged to know that the fulfilment of the following items (i) to (vii) will be an imperative for undertaking any research assignment / project funded by industry for being proper and ethical. Thus, in accepting such a position a medical practitioner shall:—
  - (i) Ensure that the particular research proposal(s) has the due permission from the competent concerned authorities.
  - (ii) Ensure that such a research project(s) has the clearance of national/ state / institutional ethics committees / bodies.
  - (iii) Ensure that it fulfils all the legal requirements prescribed for medical research.
  - (iv) Ensure that the source and amount of funding is publicly disclosed at the beginning itself.
  - (v) Ensure that proper care and facilities are provided to human volunteers, if they are necessary for the research project(s).
  - (vi) Ensure that undue animal experimentations are not done and when these are necessary they are done in a scientific and a humane way.
  - (vii) Ensure that while accepting such an assignment a medical practitioner shall have the freedom to publish the results of the research in the greater interest of the society by inserting such a clause in the MoU or any other document / agreement for any such assignment.
- (f) Maintaining Professional Autonomy: In dealing with pharmaceutical and allied healthcare industry a medical practitioner shall always ensure that there shall never be any compromise either with his/her own professional autonomy and/or with the autonomy and freedom of the medical institution.

- (g) Affiliation: A medical practitioner may work for pharmaceutical and allied healthcare industries in advisory capacities, as consultants, as researchers, as treating doctors or in any other professional capacity. In doing so, a medical practitioner shall always:
  - (i) Ensure that his professional integrity and freedom are maintained.
  - (ii) Ensure that patients' interests are not compromised in any way.
  - (iii) Ensure that such affiliations are within the law.
  - (iv) Ensure that such affiliations / employments are fully transparent and disclosed.
- (h) Endorsement: A medical practitioner shall not endorse any drug or product of the industry publically. Any study conducted on the efficacy or otherwise of such products shall be presented to and / or through appropriate scientific bodies or published in appropriate scientific journals in a proper way".[Emphasis added is ours]

6. On a plain reading of the aforesaid notification, which has been heavily relied upon by the department, it is quite apparent 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. 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, before us the learned senior counsel, Shri Mistry brought to our notice the judgment of Hon'ble Delhi High Court in the case of *Max Hospital v. MCI* [WPC 1334/2013, 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. Relevant portion of the said judgment reads as under:

*"6. The Petitioner's grievance is twofold. Firstly, that since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of*

*the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The case of the Petitioner is that the Petitioner hospital is governed by the Delhi Nursing Homes Registration Act, 1953. It is urged that in fact, an inspection was also carried out on 22.07.2011 by Dr. R.N. Dass, Medical Superintendent (Nursing Home) under the Directorate of Health Services, Govt. of NCT of Delhi and the necessary equipments and facilities were found to be in order which negates the observations dated 27.10.2012 of the Ethics Committee of the MCI. It is also the plea of the Petitioner hospital that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated.*

7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the 2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. Its plea however, is that it has not passed any order against the Petitioner hospital therefore; the Petitioner cannot have any grievance against the impugned order. . . . .

8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital. Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were in fact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not while passing the impugned order. Suffice it to say that the observations dated 27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained. " [Emphasis added is ours]

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. The relevant provision of section 37(1) reads as under:

"(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the heads "profits and gains of business or profession."

Explanation 1 - For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

The aforesaid provision applies to an assessee who is claiming deduction of expenditure while computing his business income. 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.

7. Before us the learned CIT DR strongly relied upon the fact that CBDT Circular, while clarifying the applicability of Explanation 1 to section 37(1) on medical practitioners and pharmaceutical companies have interpreted that Indian Medical Council Regulation is applicable for pharmaceutical companies also. He also brought to our notice that another notification was issued by Indian Medical

Council which was published on 01.12.2016 which further prohibits such kind of embargo on medical practitioners and have added para 6.8.1 and also given instances of action which shall be taken upon medical practitioners. The relevant clause of the said notification as relied upon by him is reproduced hereunder:

6.8. Code of conduct for doctors in their relationship with pharmaceutical and allied health sector industry. The Section 68.1(b) shall be substituted in terms of Notification published on 01.02.2016 in Gazette of India, as under:

(b) Travel facilities: A medical practitioner shall not accept any travel facility inside the country or outside, including rail, road, air, ship, cruise tickets, paid vacation, 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.

(iii) Action to be taken by the Council for violation of section 6.8 as amended vide notification dated 10/12/2009, shall be prescribed by further amending the Section 6.8.1 as under:—

SECTION	ACTION
<p>6.8.1 In dealing with pharmaceutical and allied health sector industry, a medical practitioner shall follow and adhere to the stipulations given below: -</p> <p>(a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives;</p>	<p>Gifts more than Rs. 1,000/- upto Rs. 5,000/- : Censure.</p> <p>Gifts more than Rs. 5,000/- upto Rs. 10,000/- : Removal from Indian Medical Register or State Medical Register for 3 (three) months.</p> <p>Gifts more than Rs. 10,000/- to Rs. 50,000/- : Removal from Indian Medical Register or State Medical Register for 6(six) months.</p> <p>Gifts more than Rs. 50,000/- to Rs. 1,00,000/- : Removal from Indian Medical Register or State Medical Register for 1 (one) year.</p> <p>Gifts more than Rs. 1,00,000/- : Removal for a period of more than 1 (one) year from Indian Medical Register or State</p>

(b) Travel facilities: A medical practitioner shall not accept any travel facility inside the country or outside, including rail, road, 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.

(c) Hospitality: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext.

Medical Register.

Expenses for travel facilities more than Rs. 1,000/- upto Rs. 5,000/-: Censure.

Expenses for travel facilities more than Rs. 5,000/-upto Rs. 10,000/-: Removal from Indian Medical Register or State Medical Register for 3 (three) months.

Expenses for travel facilities more than Rs.10,000/-to

Rs. 50,000/-: Removal from Indian Medical Register or State medical Register for 6 (six) months.

Expenses for travel facilities more than Rs. 50,000/- to Rs. 1,00,000/-: Removal from Indian Medical Register or State Medical Register for 1 (one) year.

Expenses for travel facilities more than Rs. 1,00,000/-: Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register

Expenses for Hospitality more than Rs. 1,000/- upto Rs. 5,000/-: Censure

Expenses for Hospitality more than Rs. 5,000/- upto Rs. 10,000/-: Removal from Indian Medical Register or State Medical Register for 3 (three) months.

Expenses for Hospitality more than Rs. 10,000/- to

Rs. 50,000/-: Removal from Indian Medical Register or State medical Register for 6 (six)

months.

Expenses for Hospitality more than Rs. 50,000/- to Rs. 1,00,000/-: Removal from Indian Medical Register or State Medical Register for 1 (one) year.

Expenses for Hospitality more than Rs. 1,00,000/-: Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register.

(d) Cash or monetary grants:-

A medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law / rules / guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed.

Cash or monetary grants more than Rs. 1,000/-upto Rs. 5,000/-: Censure.

Cash or monetary grants more than Rs. 5,000/-upto Rs. 10,000/- : Removal from Indian Medical Register or State Medical Register for 3 (three) months.

Cash or monetary grants more than Rs. 10,000/-to Rs. 50,000/-: Removal from Indian Medical Register or State Medical Register for 6 (six) months.

Cash or monetary grants more than Rs. 50,000/-to Rs. 1,00,000/-: Removal from Indian Medical Register or State Medical Register for 1 (one) year.

Cash or monetary grants more than Rs. 1,00,000/-: Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register.

From the aforesaid notification, ld. CIT DR submitted that so many violations and censures have been prescribed for any expenditures/ or benefit given to doctors, thus, violation of such guidelines for incurring such kind of expenditures cannot be held to be allowable expenditure. CBDT is well within its power to clarify and interpret the law and

prohibit allowance of any expenditure which violates any statute or is in nature of offence.

8. From a perusal of above amendment/notification in the MCI regulation, it is quite clear again 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) r.w. Explanation 1, then it is only meant for medical practitioners and not for pharmaceutical company (Assessee Company) for claiming the expenditure.

9. Adverting to the contention of the Ld. CIT DR that CBDT is well empowered to issue such clarification, it is seen that the CBDT Circular dated 01.08.2012 (*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 circulars 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 same CBDT circular had come up for consideration before the coordinate Bench of the ITAT, Mumbai Bench in the case of *Syncom Formulations (I) Ltd.* [IT Appeal Nos. 6429 & 6428 (Mum.) of 2012, dated 23-12-2015], wherein Tribunal held that CBDT circular would not be applicable in the A.Ys. 2010-11 and 2011-12 as it was introduced w.e.f. 1.8.2012.

**10.** From the perusal of the nature of expenditure incurred by the assessee, it is seen that under the head "Customer Relationship Management", the assessee arranges national level seminar and discussion panels of eminent doctors and inviting of other doctors to participate in the seminars on a topic related to therapeutic area. It arranges lectures and sponsors knowledge upgrade course which helps pharmaceutical companies to make aware of the products and medicines manufactured and launched by it. Under Key Account Management, 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 patients. 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. Coming to the gift articles and free samples of medicines, it is seen that 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, as pointed out by the assessee before the authorities below and also before us are very cheap and 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, 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. Further as pointed out and concluded by the learned CIT(A) there is no violation by the assessee in so far as giving any kind of freebies to the medical practitioners. Thus, such kind of expenditures by a pharmaceutical companies are purely for business purpose which has to be allowed as business expenditure and is not impaired by EXPLANATION 1 to section 37(1).

**11.** Before us, the Ld. CIT DR has also much harped upon the decision of the Hon'ble Himachal Pradesh High Court in the case of *Confederation of Indian Pharmaceutical Industry (SS) (supra)*, in support of the argument that CBDT Circular has been approved and confirmed by the High Court and therefore, it has a huge binding precedence. From the perusal of the said judgment of the Hon'ble High Court, it is seen that in that case the validity of Circular No.5/12 dated 1.8.2012 was challenged. The Hon'ble High Court though upheld the validity of the said circular but with a rider that if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulation framed by the medical council, then it may legitimately claim the deduction. The assessee has to satisfy the AO that the expenditure is not in violation of the Medical Council regulation. Thus, if the assessee brings out that the MCI regulation is not applicable to the assessee before the AO, the same cannot be applied blindly.

**12.** At the time of hearing, our attention was also drawn to the decision of Tribunal of our Co-ordinate Bench in the case of *Asstt. CIT v. 'Liva Healthcare Ltd.* [\[2016\] 161 ITD 63/73 taxmann.com 171](#). In counter, to this decision the learned counsel, Shri JD Mistry distinguished the said judgment and submitted that the facts of the case in the *Liva Healthcare (supra)* were substantially different from the facts of the present case. In the case of *Liva Healthcare (supra)*, the Hon'ble Tribunal disallowed such expenses u/s. 37(1) of the Act on the ground that they were not incurred wholly and exclusively for the purpose of business as the same

were incurred to create good relations with the doctors in lieu of expected favours from doctors for recommending to the patients the pharmaceutical products dealt with by the company to generate more and more business and profits for the assessee company. The Tribunal also recorded the fact that the spouse of the doctors also accompanied the doctors for overseas trips to Istanbul and expenses were incurred for cruise travels to island, gala dinner, cocktails, gala entertainment etc. of such doctors. In assessee's case it is an admitted fact that expenses have not been incurred for the purpose personal benefit/enjoyment of the doctors or their spouses. In the case of Liva, the question as to whether such IMC Regulations can be applicable to Pharma Companies was not argued before the Hon'ble Bench. He reiterated that the Hon'ble Delhi High Court in the case of *Max Hospital (supra)* and the Jurisdictional Tribunal in the case of *Syncom (supra)* have held that such IMC Regulations apply only to medical practitioners. He further submitted that the Tribunal in the case of *ACIT v. Liva Healthcare Ltd.* [IT Appeal No. 847 (Mum.) of 2012] for A.Y. 2008-09, has decided similar issue in favour of the assessee. However, in A.Y. 2009-10, Hon'ble Tribunal while noting the fact that consistency has to be adopted, distinguished the order of A.Y. 2008- 09 as under:

"The assessee has contended that in the immediately preceding assessment year the Tribunal has decided the issue in favour of the assessee in ITA NO. 388/Mum/2012 for assessment year 2008-09. In our considered view, principles of Res judicata is not applicable to income tax proceedings although we are fully agreeable that principles of consistency is to be maintained (Hon'ble Supreme Court decision in *Radha Soami Satsang v. CIT* [1992] 193 ITR 321 but in the instant assessment year, we have observed that these overseas trips for Doctors and their spouses were organized by the assessee whereby no details of the contents of seminar, if any conducted by the assessee overseas has been brought on record and also even the spouses accompanied the Doctors to the overseas trip which included cruise visit to island, gala dinners, cocktail, gala entertainment etc. rather than being directed towards seminar for product information dissemination or directed towards knowledge enhancement or knowledge sharing oriented as no details of seminar and its course content is brought on record rather the trip is directed towards leisure and entertainment of Doctors and their spouses which in our view appears to be clearly a distinguishable feature in this year enabling us to take a divergent view and the expenses incurred by the assessee cannot be allowed as business expenditure u/s. 37 of the Act as it is clearly hit by explanation to Section 37 of the Act being against public policy as unethical prohibited by law."

In view of the above, he pointed out that in the above decision for A.Y. 2009-10 in the case of Liva Healthcare, there was a specific finding of a fact that no details have been filed with respect to any seminar has been conducted for doctors and that the trips were directed towards leisure and entertainment of doctors and their spouses. This was a distinguishable feature for the Hon'ble Tribunal to take a contrary view from A.Y. 2008-09. He further submitted that the Hon'ble Tribunal in the case of *Liva Healthcare Ltd. v. ACIT* [IT Appeal No. 4791 (Mum.) of 2014] for A.Y. 2010-11 has followed the decision of *Liva Healthcare (supra)* for A.Y. 2008-09 and has decided this issue in favour of the assessee. This, further brings out the fact that the Hon'ble Tribunal disallowed the expenses u/s. 37(1) of the Act in the case of Liva Healthcare for A.Y. 2009-10 only on the ground that the same were not incurred wholly and exclusively for the purpose of business.

**13.** Apart from the aforesaid distinguishing features as highlighted by the learned senior counsel, we find that on the facts itself in the case of *Liva Healthcare* [2009-2010] (*supra*), there was a clear cut material on record that the Doctors along with their spouses were taken to foreign tours and cruise travel etc., in lieu of expected favours from doctors. In the light of these facts and material the Tribunal has decided the issue against the assessee by not following the earlier year precedence and subsequent year orders of the same assessee. As brought on record before us, we find that similar issue of allowance of such expenditure in the case of pharmaceutical companies has been decided in favour of the assessee, in the case of *UCB India (P.) Ltd. v. ITO* [IT Appeal No. 6681 (Mum.) of 2013, dated 13-05-2016], wherein it was held that CBDT circular cannot have a retrospective effect. This judgment was lost sight of by the bench. In any case on careful perusal of the Tribunal order in the case of *Liva Healthcare (supra)* we find that the Tribunal though has incorporated the relevant provisions and clauses of the 'Indian Medical Council Regulation 2002', however, has not elaborated or dwell upon as to how this MCI regulation which is strictly meant for medical practitioners and doctors can be made applicable to pharmaceutical companies. There has to be some enabling provision or specific clause in the said regulation whereby the pharmaceutical companies are barred from conducting seminars or conferences by sponsoring the doctors. The entire conduct relates to doctors and medical practitioners and lists out the censures and fines imposed upon them. What has not been provided in the MCI regulation cannot be supplied either by the court or by the CBDT. There has to be express provision under the law whereby pharmaceutical companies are prohibited to conduct conferences or seminar or give free samples. In the Tribunal decision of Liva

Healthcare, strong reference has been made to Hon'ble Himachal Pradesh High Court (*supra*), that the said CBDT circular has been upheld. On this aspect we have already discussed in detail herein above that, firstly, High Court itself carves out a rider that assessee is free to demonstrate before the AO that this circular is not applicable on facts of the case; and secondly, CBDT circular which creates new impairment and imposes disallowability not envisaged in any of the Act or regulation cannot be reckoned to be retrospective. Another strong reference has been made to the decision of Hon'ble Punjab & Haryana High Court in the case of *CIT v. Kap Scan and Diagnostic Centre (P.) Ltd.* [\[2012\] 344 ITR 476/25 taxmann.com 92](#), wherein commission was paid to the private doctors for referring the patients for diagnosis to the assessee company. In background of these facts and issues involved, the Hon'ble High Court held that said payment of commission is wrong and is opposed to be a public policy. It should be discouraged as it is not a fair practice. The ratio of said decision cannot be applied on the facts of the present case because there is no violation of any law or anything which is opposed to public policy. Similarly, there is reference to the decision of Hon'ble Supreme Court in the case of *Eskayef (Now Known as Smithkline Beecham) Pharmaceuticals (India) Ltd. v. CIT* [\[2000\] 245 ITR 116/111 Taxman 561](#), which was given in context of Section 37(3A) of the Act. In the said case the assessee had claimed expenditure on distribution of physician's samples u/s. 37. In the background of such claim the Hon'ble Apex court held that, if the expenditure falls within the bare minimum it will not be caught by sub-section (3A) of section 37. On the contrary, the Hon'ble Apex Court observed that physicians samples are necessary to ascertain the efficacy of medicine and introduce it in the market for circulation and it is only by this method the purpose is achieved. In such cases giving a physician samples for reasonable period is essential to the business of manufacture and sale of medicine. It is only if a particular medicine has been introduced by the market and its uses are established then giving of free samples could only be the measure of sale/ promotion and development would thus be hit by sub-section (3A). Said decision no way prohibits the nature of expenditure which has been incurred in the case of the assessee. Therefore, such a reference to a Hon'ble Apex Court decision is not germane to the issue involved. Thus, in our opinion, the aforesaid decision of this Tribunal is clearly distinguishable and cannot be held to be applicable and also we have already given our independent finding as to allowability of expenses in the hands of the assessee as business expenditure.

14. Accordingly, we uphold the order of the Id. CIT(A) deleting the disallowance aggregating to Rs. 22,99,72,607/-.”

9. The Hon’ble Delhi High Court in *Max Hospital v. MCI* in [WPC 1334 of 2013, dated 10-1-2014], held 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. The High Court further held that 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.
10. Thus, considering the above factual and the legal position, we are of the view that expenditure incurred by assessee on distributing glass, face mask, pen, writing pad, towel set, wall clock, paper cups except ‘Voltas Cooler and stabilizer’ cannot be regarded as freebies given to the Doctors. Hence, except the cost of the Voltas Cooler and stabilizer of Rs.29,990/-, we allow all the remaining expenditure incurred by the assessee on account of sale promotion expenses. Therefore, the ground of appeal raised by the assessee is partly allowed.
11. In the result the appeal of the assessee is partly allowed.

**ITA No. 6245/M/2017 for AY 2013-14.**

12. The assessee has raised identical grounds of appeal except variation of figure of disallowance. Considering the fact that we have already allowed the appeal of the assessee for assessment year 2012-13 on similar grounds of appeal, thus following the principals of consistency the ground of appeal raised by assessee for the year under consideration is also allowed with similar observation.

13. In the result the appeal of the assessee for assessment year 2013-14 is allowed.

Order pronounced in the open court on this 20<sup>th</sup> day of April, 2018.

**Sd/-**  
**(B.R. BASKARAN)**  
**ACCOUNTANT MEMBER**  
Mumbai; Dated 20/04/2018  
S.K.PS

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**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,

(Asstt.Registrar)  
**ITAT, Mumbai**