IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM

ITA No.6680/Mum/2012
ITA No.5553/Mum/2014
ITA No.5479/Mum/2015

(**निर्धारण वर्ष** / Assessment Years:2009-10, 2011-12 & 2012-13)

M/s Aristo Pharmaceuticals Pvt. Ltd. Mercantile Chambers, 3rd Floor, 12, J.N. Heredia Marg, Ballard Estate, Mumbai-400 001.	**बनाम**/ Vs.	Asst.CIT-2(1) 5th Floor, Aayakar Bhavan, Mumbai- 400020
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACA4495N		
(अपीलार्थी /**Appellant)**	**:**	**(**प्रत्यर्थी / Respondent**)**

ITA No.6129/Mum/2014
ITA No.5167/Mum/2015
ITA No.5747/Mum/2015

(**निर्धारण वर्ष** / Assessment Years:2005-06, 2011-12 & 2012-13)

DCIT-2(1)(1), Room No. 561, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai- 400020	**बनाम**/ Vs.	M/s Aristo Pharmaceuticals Pvt. Ltd. Mercantile Chambers, 3rd Floor, 12, J.N. Heredia Marg, Ballard Estate, Mumbai-400 001
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACA4495N		
(अपीलार्थी /**Appellant)**	**:**	**(**प्रत्यर्थी / Respondent**)**

अपीलार्थी की ओर से / **Appellant by**	:	Shri Ajay Kumar Rastogi, A.R
प्रत्यर्थी की ओर से**/ Respondent by**	:	Shri R.P. Meena & Shri Rajesh Kumar Yadav, D.Rs

सुनवाई की तारीख / **Date of Hearing**	**:**	05.06.2018
घोषणा की तारीख **/ Date of Pronouncement**	**:**	26.07.2018

आदेश / **ORDER**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeals filed by the assessee and the revenue are directed against the respective orders passed by the CIT(A)-4, Mumbai for A.Y. 2005-06, A.Y. 2009-10, A.Y. 2011-12 and A.Y. 2012-13, which in itself arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 21.03.2011 for A.Y. 2005-06; order passed by the A.O under Sec. 154 of the Act, dated 24.08.2012 for A.Y. 2009-10; order passed by the A.O under Sec. 143(3) of the Act, dated 28.03.2013 for A.Y. 2011-12; and order passed by the A.O under Sec. 143(3) of the Act, dated 06.01.2015 for A.Y. 2012-13. As certain common issues are involved in the aforementioned appeals, thus the same are being taken up and disposed off by way of a composite order. We shall first take up the appeal filed by the revenue against the order passed by the CIT(A), setting aside the penalty imposed by the A.O under Sec. 271(1)(c) in the case of the assessee for A.Y. 2005-06. The revenue assailing the order of the CIT(A) has raised before us the following grounds of appeal:-

> *"On the facts and in the circumstances of the case and in Law, the Learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:*
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> 1. *The order of the CIT(A) is opposed to Law and facts of the case.*
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> 2. *On the facts and in the circumstances of the case and in Law, the Ld. CIT(A) erred in deleting the penalty levied u/s.271(1)(c) without appreciating the fact that the assessee had concealed his income and had filed inaccurate particulars of his income as per the provisions of section 271(1)(c) read with Explanation 1 thereto of the Income Tax Act, 1961.*
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> 3. *For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the A.O. restored."*

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and sale of pharmaceuticals products had filed its return

of income for A.Y. 2005-06 on 31.10.2005, declaring income at Rs. 81,16,05,080/-. The case of the assessee was therafter taken up for scrutiny assessment under Sec. 143(2) of the Act.

3. The issue involved in the present appeal lies in a narrow compass. The assessee in its return of income had claimed deduction under Sec. 80IB of Rs. 16,18,40,947/- on account of a new industrial undertaking located at Daman. The deduction claimed by the assessee was to the extent of 30% of the profits of the said unit. The A.O while framing the assessment, being of the considered view that the deduction under Sec. 80IB was to be worked out on the basis of the profit and gains 'derived from' an eligible industrial undertaking, thus declined to allow the said deduction in respect of certain other incomes aggregating to Rs. 5,87,993/- viz. (i) interest on MSEB : Rs. 622/-; (ii) interest on security deposit for tender : Rs. 13,615/-; (iii) interest on electricity deposits : Rs. 828/-; (iv) insurance claim : 4,33,788/-; and (v) miscellaneous income : Rs. 1,39,140/-. The A.O further characterizing the expenditure of Rs. 3,58,454/- incurred by the assessee on computer software as a capital expenditure, therein dislodged the claim of the same as a revenue expenditure by the assessee. Still further, the A.O carried a lump sum disallowance of 25% of the expenses on gift articles as claimed by the assessee and made a disallowance of Rs. 1,22,06,085/- on the said count in the hands of the assessee. However, the disallowance in respect of expenses incurred by the assessee on gift articles was on appeal scaled down by the CIT(A) to 15% of the aggregate of such expenses, as a result whereof the disallowance stood restricted to an amount of Rs. 73,23,651/-.

4. Subsequent to the receipt of the CIT(A) order a 'Show cause' Notice (for short 'SCN') under section 274 r.w.s. 271(1)(c), dated 28.09.2010 was issued by the A.O. The A.O not finding favour with the explanation of the assessee as regards the issues involved viz. (i) raising of a wrong claim of deduction under Sec. 80IB which had resulted in under assessment of its income; (ii) wrong claim of computer software expenses which though was in the nature

of capital expenditure, but was claimed as a revenue expenditure by the assessee; and (iii) wrong claim of expenditure on account of gift articles which were incurred for non-business purposes, thus imposed a penalty of Rs. 1,07,50,531/- under Sec. 271(1)(c) of the Act. However, pursuant to an application filed by the assessee under Sec. 154 of the Act, the quantum of penalty imposed by the A.O was reduced to an amount of Rs. 30 lac, vide a rectification order dated 06.01.2014 passed by the A.O under Sec. 154 of the Act.

5. Aggrieved, the assessee carried the rectified order of penalty, dated 06.01.2014 in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee in support of its claim that no penalty under Sec. 271(1)(c) was liable to be imposed in respect of the additions/disallowances sustained in its hands viz. (i) disallowance of part of the claim of deduction under Sec. 80IB; (ii) re-characterisation by the A.O of the computer software expenses as capital expenditure; and (iii) disallowance of 15% of gift article expenses, being persuaded to subscribe to the said claim of the assessee, deleted the penalty of Rs. 30 lac imposed by the A.O, observing as under :

> *"3.3 I have considered the background of the case, finding of the A.O in penalty order as well as in rectification order and have also considered the rival submission of the appellant, carefully. I find that this is the case of simple disallowance of some part of deduction u/s.80IB and disallowance of capital expenditure related to computer software and further disallowance of 15% of gift articles expense. Obviously, appellant has disclosed all the facts in return of income, profit & loss account in computation of income and has also given all the relevant details to the A.O. at every stage of proceedings, hence, merely on the ground that some part of claim of deduction related to business of the appellant, but not derived from industrial undertaking, it cannot be presumed that there is a concealment of income or furnishing of inaccurate particulars of income. The dispute, if at all, between the appellant and the A.O in respect of allowance of deduction u/s.80IB on other income viz.- interest on MSEB amounting to Rs. 622/-, interest on security deposit for tender amounting to Rs. 13,615/-, interest on electricity deposit amounting to Rs. 828/-,*

insurance claim amounting to Rs. 4,33,788/- and miscellaneous income amounting to Rs. 1,39,140/- totalling to Rs. 5,87,993/- as would be evident from order under section 154 dated 19.12.2013 – copy enclosed. This issue has always been subject matter of debate between the appellant and the department since assessment year 1995-96 onwards and the issue has always been decided in favour of the appellant. The Tribunal vide order dated 30th Sept. 2005 for assessment year 1995-96 to 2001-02 has decided the issue in favour of the appellant and no appeal was preferred by the Revenue u/s.260A. The Tribunal again vide its order dated 30.05.2008 for assessment year 2002-03 to 2004-05 following its earlier order has decided the issue in favour of appellant. In the circumstances, the claim of the concealment and or furnishing of inaccurate particulars of income by the A.O. while imposing penalty is wholly misconceived. I find force in the contention of the appellant because as mentioned earlier, there is no concealment or furnishing of inaccurate particulars of income, hence, no penalty can be levied. Appellant gets support from the above decision relied upon by Ld. A.R. in the case of Benette Coleman and Co. Ltd. Vs. ACIT 24 ITR (ITAT Mumbai) 102, it is held that if any disallowance is made, no penalty can be levied. Hon'ble ITAT has held as under :

> *"In the absence of a other contrary material or distinguishing feature brought on record by the revenue to show that the claim of deduction made by the assessee was not bonafide or was bogus, we respectfully following the ratio of the above decisions and the consistent view hold that there is no concealment on the part of the assessee which may call for levy of penalty u/s.271(1)(c) of the Act and accordingly the penalty imposed by the Assessing officer and sustained by the Ld. Commissioner of Income-tax(Appeals) is deleted."*

Since it is a simple case of disallowance of some of the expenditures from total deduction claimed u/s. 80IB(4) and disallowance of computer software expenditure as capital expenditure and disallowance of 15% of Gift Articles expenses, it becomes very obvious that there is no furnishing of inaccurate particulars of income or concealment of income. The Hon'ble Supreme Court in the case of CIT Vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 1058 (SC), has held that merely because of disallowance of any claim which is legally not allowable, no penalty can be levied when there is no concealment of any material facts or furnishing of inaccurate particulars of income. The A.O is therefore directed to delete the penalty of Rs. 30 lakhs levied by him by rectifying the original penalty of Rs. 1.25 crores."

6. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Learned Departmental Representative (for short 'D.R') at the very outset submitted that the assessee had furnished wrong particulars and therein inflated its claim of deduction under Sec. 80IB, as well as had wrongly debited expenditure on gift articles which were

incurred for non-business purposes and also raised a wrong claim in respect of computer software expenses which was in the nature of a capital expenditure, therefore, the A.O had rightly imposed penalty under Sec. 271(1)(c) in the hands of the assessee. The Ld. D.R to support his aforesaid contention relied on the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Zoom Communication (P) Ltd. (2010) 327 ITR 510 (Del). Per Contra, the Learned Authorized Representative (for short 'A.R') for the assessee objected to the validity of the jurisdiction assumed by the A.O for imposing penalty under Sec. 271(1)(c) in the hands of the assessee. The Ld. A.R in support of his aforesaid contention took us through the 'SCN' issued by the A.O under Sec. 274 r.w.s. 271(1)(c), dated 29.12.2007, 21.04.2008, 22.05.2008 and 28.09.2010. The Ld. A.R taking us through the aforesaid notices, submitted that a perusal of the 'SCN' dated 29.12.2007 revealed that the A.O had failed to strike off the irrelevant default. On the basis of his aforesaid submissions, it was the claim of the Ld. A.R that the assessee was never put to notice as regards the default for which penalty was sought to be imposed on it. The Ld. A.R taking support of the order passed by the Hon'ble Supreme Court while dismissing the SLP of the revenue in the case of CIT & Anr. Vs. M/s SSA's Emerald Meadows [SLP (C)...../2016 (CC No. 11485/2016), dated 05.08.2016], submitted that on the failure on the part of the A.O to strike off the irrelevant default in the 'SCN', no penalty under Sec. 271(1)(c) could validly be imposed in the hands of the assessee. On merits, the Ld. A.R relied on the order passed by the CIT(A). The Ld. A.R. submitted that as the computation of deduction under Sec. 80IB had remained a subject matter of debate since long, hence the CIT(A) had rightly appreciated that no penalty under Sec. 271(1)(c) could have validly been imposed on the said count. It was further averred by the Ld. A.R that mere characterization of the computer software expenses by the revenue as a capital expenditure, as against *bonafide* claim of the same as a revenue expenditure by the assessee, would not call for penalty under Sec. 271(1)(c) in the hands of the assessee. The Ld. A.R further submitted that an adhoc disallowance of 15% of the expenditure incurred by the assessee on gift

articles would also not justify imposition of penalty under Sec. 271(1)(c). The Ld. D.R rebutting the challenge thrown by the Ld. A.R to the validity of the assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(1)(c), submitted that as neither any cross-objection or a cross-appeal was filed by the assessee in context of its aforesaid claim, thus it was not permissible on its part to have challenged the validity of the assumption of jurisdiction by the A.O, without putting the revenue to notice as regards the same. Alternatively, the Ld. D.R submitted that the non-striking off the irrelevant default in the 'SCN' would not have any bearing on the validity of the penalty imposed under Sec. 271(1)(c) in the hands of the assessee, as long as the same is found to be in conformity with the basis on which such penalty proceedings were initiated by the A.O while framing the assessment. In support of his aforesaid contention the ld. D.R relied on the order of the ITAT, Mumbai Bench "A", Mumbai, in the case of Sansui Steel Pvt. Ltd. Vs. ITO-7(2)(2), Mumbai (ITA No. 1403/Mum/2015, dated 30.11.2017).

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the A.O had declined the claim of deduction of the assessee under Sec. 80IB in respect of certain other incomes aggregating to Rs. 5,87,993/- viz. (i) interest on MSEB : Rs. 622/-; (ii) interest on security deposit for tender : Rs. 13,615/-; (iii) interest on electricity deposits : Rs. 828/-; (iv) insurance claim : 4,33,788/-; and (v) miscellaneous income : Rs. 1,39,140/-. We find from a perusal of the order of the CIT(A) that the entitlement of the assessee for claim of deduction under Sec. 80IB in respect of the aforesaid other incomes had always been the subject matter of debate between the assessee and the department since A.Y. 1995-96 onwards, and the same had always been decided in favour of the assessee. We find that the Tribunal, vide its order dated 30.09.2005 for A.Ys. 1995-96 to 2001-02 had decided the said issue in the favour of the assessee. The revenue had accepted the said order of the Tribunal and had not carried the same in further appeal before the High Court. Still further, the Tribunal following its

earlier order had again vide its order dated 30.05.2008 for A.Ys 2002-03 to 2004-05 had decided the said issue in favour of the assessee. We are of the considered view that in the backdrop of the aforesaid factual position and the fact that the assessee had furnished complete details as regards its claim of deduction under Sec. 80IB(4) of the Act, thus merely for the reason that the said claim of deduction did not find favour with the A.O would not justify imposition of penalty under Sec. 271(1)(c) in the hands of the assessee. We are further of the considered view that the re-characterization of the computer software expenditure as a capital expenditure by the A.O, as against the claim of the same as a revenue expenditure by the assessee, though would justify the disallowance of the said expenditure, but keeping in view the fact that the assessee had made a complete disclosure of the details of the said expenditure and claim of the same as a revenue expenditure in its return of income, thus no penalty under Sec. 271(1)(c) could have been imposed in the hands of the assessee. Still further, we are persuaded to subscribe to the view of the CIT(A) that no penalty was called for in the hands of the assessee in respect of the adhoc 15% disallowance of the gift articles expenses as was finally sustained by the CIT(A). We are of the considered view that though an unproved claim of expenditure would justify an addition/disallowance, however nothing short of a disproved claim would justify imposition of penalty under Sec 271(1)(c) of the Act. We find that our view that no penalty under Sec. 271(1)(c) on either of the aforesaid counts could have validly been imposed in the hands of the assessee is fortified by the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC). We thus, finding no infirmity in the order of the CIT(A), uphold the deletion of the penalty of Rs. 30 lac imposed by the A.O under Sec. 271(1)(c) as per his rectified penalty order, dated 06.01.2014.

8. The appeal filed by the revenue is dismissed.

ITA No. 6680/Mum/2012
A.Y. 2009-10

9. We shall now take up the appeal of the assessee for A.Y. 2009-10. The assessee assailing the order passed by the CIT(A) has raised before us the following grounds of appeal :

> *"1. For that the Ld. CIT(A) has erred in upholding disallowance of Rs.99,91,996/- out of Sales Promotion Expenses in order u/s 154 passed by the Assessing Officer.*
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> *2. For that the Ld. CIT (A) has erred in confirming exercise of power u/s 154 by the Assessing Officer even though there was no mistake apparent on record.*
>
> *3. For that the Ld. CIT (A) has erred in holding that the A.O. has rectified the clerical error in calculation of disallowance @10% under the head "Sale Promotion Expense" in the order impugned.*
>
> *4. For that the Ld. CIT (A) has failed to appreciate that the Assessing Officer while passing order u/s 143(3) dated 30/09/2011 has disallowed a sum of Rs.10,00,000/- on account of Sale Promotion Expense and thus there was no mistake apparent on record which has been rectified in the order impugned by enhancing the disallowance to Rs.99,91,996/-.*
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> *5. For that the Ld. CIT(A) has erred in con1rming disallowance of Rs.99,91,996/- in order u/s 154 as against Rs.10,00,000/- disallowed originally.*
>
> *6. For that the Ld. CIT(A) has erred in holding that the grievance of disallowance of Rs.99,91,996/- does not arise from the order u/s 154 and accordingly the disallowance was affirmed to the detriment of the appellant.*
>
> *7. For that the Ld. CIT(A) has erred in upholding levy of interest u/s 234B amounting to Rs.43,61,560/- although the advance tax and TDS exceeded 90% of total tax payable and was accordingly not charged in order u/s 143(3) dated 30/09/2011.*
>
> *8. For that whole order is bad in fact and law of the case and is fit to be annulled/modified.*
>
> *9. For that the other grounds, if any, shall be urged at the time of hearing of the appeal."*

10. Briefly stated, the A.O while framing the assessment under Sec. 143(3), vide his order dated 30.09.2011 had disallowed 10% of the sales

promotion expenses and had *inter alia* made an addition of Rs. 10,00,000/- in the hands of the assessee while assessing its income at Rs. 235,69,98,790/-. Observing, that there was a clerical error as regards the disallowance made by the A.O in respect of the sales promotion expenses, the assessee brought the same to the notice of the A.O, vide his letter dated 11.10.2011. The A.O rectified the assessment order under Sec. 154 of the Act and taking cognizance of the fact brought to his notice by the assessee, that the total sales promotion expenses were to the tune of Rs. 999.19 lac and not Rs. 99.91 lac as considered by him while framing the assessment, thus made a disallowance on account of sales promotion expenses at Rs. 99,91,996/- (i.e. 10% of Rs. 999.19 lacs).

11. Aggrieved, the assessee assailed the order passed by the A.O under Sec. 154 before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee before him, observed that the A.O while framing the assessment under Sec. 143(3), vide his order dated 30.09.2011 had wrongly taken the sales promotion expenses at Rs. 99.91 lac for calculating 10% of disallowance. It was observed by the CIT(A) that it was only when the assessee brought it to the notice of the A.O that the correct amount of sales promotion expenses was Rs. 999.19 lac, that the A.O had rectified his order under Sec. 154 and had modified the amount of disallowance of 10% of the sales promotion expenses to an amount of Rs. 99.91 lac (i.e. 10% of Rs. 999.19 lac). It was observed by the CIT(A) that the assessee by not assailing the assessment order for the year under consideration viz. A.Y 2009-10, had thus accepted the disallowance of 10% of the sales promotion expenses made by the A.O. In the backdrop of the aforesaid facts, it was observed by the CIT(A) that as the A.O while passing the order under Sec. 154 had not taken any fresh decision on merits in respect of the disallowance of the sales promotion expenses but had only rectified a clerical mistake that had crept in his order while computing the sales promotion expenses, thus the grievance of the assessee as regards the maintainability of such disallowance on merits did not arise from the order passed by the A.O under

Sec.154 of the Act. On the basis of his aforesaid deliberations, the CIT(A) concluded that though the grievance of the assessee as regards the disallowance of the sales promotion expenses on merits did arise from the order passed by the A.O under Sec. 143(3), however as the assessee by not carrying the same in further appeal had allowed the same to attain finality, therefore, it was not permissible for him to now contest the merits of the said disallowance by way of an appeal against the order passed by the A.O under Sec. 154 of the Act. The CIT(A) on the basis of his aforesaid observations dismissed the appeal of the assessee.

12. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Ld. A.R submitted that the A.O had in his order passed under Sec. 154 enhanced the disallowance of the sales promotion expenses. The Ld. A.R in support of his contention took us through the observations of the A.O in context of the issue under consideration as recorded in the assessment order. It was submitted by the Ld. A.R that though it was brought to the notice of the A.O that the sales promotion expenses were wrongly taken by him at Rs. 99.91 lac as against the actual expenditure of Rs. 999.91 lac, however, the assessee had at no stage stated that the disallowance out of the sales promotion expenses were also to be enhanced from Rs. 10 lac [as disallowed in the assessment framed under Sec. 143(3)] to an amount of Rs. 99,91,996/- (i.e. 10% of total sales promotion expenses of Rs. 999.19 lac). It was further submitted by the Ld. A.R that the A.O while carrying out the rectification had though substantially enhanced the income of the assessee by raising the disallowance of the sales promotion expenses from an amount of Rs. 10 lac [as per order under Sec. 143(3)] to an amount of Rs. 99,91,996/-, however no opportunity of being heard was afforded to the assessee before passing of the order under Sec. 154 of the Act. The Ld. A.R in support of his claim that an addition/disallowance made under Sec. 154 can be assailed independently without there being any appeal against the original assessment order, relied on the judgment of the Hon'ble Supreme Court in

the case of S. Sankappa & Ors. Vs. ITO (1968) 68 ITR 760 (SC). The Ld. A.R in support of his contention that no disallowance out of sales promotion expenses was called for in the hands of the assessee, took us through the assessment orders passed by the A.O under Sec. 143(3) in the case of the assessee for the A.Ys 2007-08 and 2008-09 (Page 14-30 of the 'APB'). The Ld. A.R drawing our attention to the aforesaid assessment orders submitted that no disallowance out of sales promotion expenses was carried out by the A.O while framing the assessment in either of the aforesaid years. Per contra, the Ld. D.R submitted that as the A.O had merely rectified a clerical mistake and that too at the behest of the assessee who had brought the same to the notice of the A.O, therefore, the CIT(A) had rightly dismissed the appeal of the assessee. The Ld. D.R in support of his contention that the A.O was not in error in rectifying the mistake which was glaring, patent, apparent and obvious from record, relied on the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Satish Kumar Agarwal (2011) 79 CCH 782 (Del).

13. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have deliberated at length on the issue under consideration and find that the A.O had merely rectified a clerical mistake in quantification of the sales promotion expenses and had not taken any new decision on merits in respect of the disallowance of the sales promotion expenses. We thus, find ourselves to be in agreement with the view taken by the CIT(A) that it was not permissible for the assessee to assail the merits of the disallowance of the sales promotion expenses in his appeal filed against the order passed by the A.O under Sec. 154 of the Act. We are of the considered view that though the assessee in its appeal against the order passed by the A.O under Sec. 154 would be well within its right to challenge any infirmity emerging from the rectification carried out by the A.O, but it was not permissible on its part to traverse beyond the subject matter of the appeal and challenge the merits of the disallowance of the sales promotion expenses, as the latter

could have only been assailed by way of an appeal against the order of assessment passed by the A.O under Sec. 143(3) of the Act. We may herein observe that the reliance placed by the ld. A.R on the judgment of the Hon'ble Apex Court in the case of S. Sankappa & Ors. Vs. ITO (1968) 68 ITR 760 (SC), not being in context of the issue under consideration, thus would not assist the case of the assessee appellant. We find that in the case before the Hon'ble Apex Court a partnership firm was assessed as an unregistered firm. On appeal, the firm was held as a registered firm by the Appellate Assistant Commissioner (for short 'AAC'). That pursuant to the order of the AAC the ITO rectified the assessment of the firm under Sec. 35(1) of the Income-tax Act, 1922. Thereafter, the ITO proceeded with to rectify the individual assessments of the partners under Sec. 155 of the Act, which however was objected to by them on the ground that in respect of the assessment year under consideration the provisions of the Income-tax Act, 1922 would be applicable. Subsequently, the rectification of the individual assessments of the partners sought to be done by the A.O under Sec. 35(5) of the Income-tax Act, 1922 was objected to by the assessee on the ground that the proceedings for rectification under Sec. 35(5) were not proceedings for assessment. We find that it was in the backdrop of the aforesaid controversy, that the Hon'ble Apex Court had held that the proceedings taken for rectification of assessment either under Sec. 35(1) or under Sec. 35(5) of the Income-tax act, 1922 were proceedings for assessment and thus the ITO was well within his right to carry out rectification of the individual assessments of the partners under Sec. 35(5) of the Act. We are unable to comprehend that as to how the aforesaid judgment of the Hon'ble Apex Court would assist the assessee in dislodging the observations of the CIT(A) that in an appeal against a rectification order passed by an A.O, the assessee could have only restricted himself to the modifications or rectifications carried out by the A.O and cannot traverse beyond that. We thus, finding no infirmity in the findings of the CIT(A) that the grievance of the assessee as regards the merits of the disallowance of 10% of the sales promotion expenses does not arise from the order passed by the A.O under

Sec. 154, thus uphold the same. However, we find that the Ld. A.R had averred before us that the order under Sec. 154 enhancing the assessed income of the assessee was passed by the A.O without affording an opportunity of being heard to the assessee. We are of the considered view that as per Sec. 154(3) of the Act, where the rectification of a mistake has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, the same shall not be carried out unless the authority concerned has given a notice to the assessee of its intention of carrying out such rectification and has allowed a reasonable opportunity of being heard to him. We thus, in the backdrop of the aforesaid contention of the Ld. A.R that the A.O had passed the order under Sec. 154 without affording a reasonable opportunity of being heard to the assessee, set aside the matter to the file of the A.O, who shall after verifying the veracity of the aforesaid claim of the Ld. A.R that the order of rectification was passed by the A.O without affording a reasonable opportunity of being heard to the assessee, and finding the same in order, shall pass a fresh order under Sec. 154 after affording a reasonable opportunity of being heard to the assessee. The **Grounds of Appeal No. 1 to 6** are allowed for statistical purposes in terms of our aforesaid observations.

14. The Ld. A.R had during the course of hearing of the appeal submitted that the Ground of Appeal No. 7 is not being pressed. We thus, in terms of the aforesaid concession of the Ld. A.R dismiss the **Ground of Appeal No. 7** as not pressed. The **Grounds of Appeal No. 8 & 9** being general are dismissed as not pressed.

15. The appeal of the assessee is allowed for statistical purposes.

ITA No. 5553 & 6129/Mum/2014
A.Y. 2011-12

16. We shall now take up the cross appeals filed by the assessee and the revenue for A.Y. 2011-12. The assessee assailing the order passed by the CIT(A) to the extent he had upheld the disallowance of sales promotion

expenses of Rs. 66,49,685/-, has raised before us the following grounds of appeal

> *"1. For that the Ld. CIT(A) has erred in sustaining disallowance of sales promotion expense amounting to Rs.66,49,685/-.*
>
> *2. For that the Ld. CIT(A) has erred in holding that expenditure incurred for distribution of costly articles (exceeding Rs.750/- each article) are freebies to doctors and professionals.*
>
> *3. For that the Ld. CIT(A) has erred in holding that the such expenditures (exceeding Rs.750/- each articles) have been incurred in violation of CBDT circular no. 5/2012 dated 01.08.2012 and are against regulations issued by Medical Counsel of India.*
>
> *4. For that the Ld. CIT(A) had erred in holding that such expenditures are prohibited by law and thus hit by Explanation to section 37(1).*
>
> *5. For that the sustenance of disallowance of Rs.66,49,685/- is wrong, illegal and unjustified on the facts and in the circumstances of the appellant's case.*
>
> *6. For that the whole order sustaining disallowance of Rs.66,49,685/- is bad in fact and law of the case and is fit to be modified.*
>
> *7. For that the whole order is bad in fact and law of the case and is fit to be modified.*
>
> *8. For that the other grounds, if any, shall be urged at the time of hearing of the appeal."*

The revenue on the other hand has assailed the order of the CIT(A) on the ground that the latter had erred in deleting the disallowance of sales promotion expenses of Rs. 9,04,32,632/- by restricting the same only in respect of the expenditure incurred by the assessee on sales promotion articles costing more than Rs. 750/- per article, by raising before us the following grounds appeal :

> *"On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:*

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of sales promotion expenses of Rs.9,04,32,632/- without considering Circular No.5/2012 {F. No 225/142/2012-ITA.II} dated 01.08.2012.*

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.9,04,32,632/- without appreciating the fact that the expenditure was incurred for providing freebies to medical practitioners and their professional associates in violation of regulation issued by Medical Council of India."*

17. Briefly stated, the assessee company which is engaged in the business of manufacturing and distribution of pharmaceuticals and allied pharma products had e-filed its return of income for A.Y. 2011-12, disclosing total income of Rs. 337,76,68,812/-. The case of the assessee was thereafter taken up for scrutiny assessment under Sec. 143(2) of the Act. On the basis of a solitary disallowance of Rs. 9,70,82,317/- on account of sales promotion expenses the income of the assessee company was assessed under Sec. 143(3) r.w.s. 154. The A.O while framing the assessment had disallowed the entire amount of sales promotion expenses of Rs. 9,70,82,317/- for the reasons viz. (i) the Medical Council of India (MCI) had imposed prohibition on medical practitioners from accepting gifts, travel facilities, hospitalities, cash or monetary grants (known as "freebies") from pharmaceutical and allied health care sector industry; and (ii) the CBDT circular No. 5/2012 issued vide F.No. 225/142/2012-ITA.II, dated 01.08.2012 had clarified that such "freebies" shall be inadmissible under Sec. 37(1) of the Act being an expense prohibited by the law.

18. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee before him, observed viz. (a) undisputedly, the assessee had incurred sales promotion expenses of Rs. 9,70,82,317/- and the genuineness of the same had not been disputed by the A.O; (b) all sales promotion articles were bearing the name and logo of the assessee company; (c) in the earlier assessment years the A.O had consistently allowed such sales promotion expenditure in the hands of the assessee company; (d) that for the first time

in A.Y. 2010-11 the A.O had disallowed part of such sales promotion expenditure, but on appeal the CIT(A) had vacated the entire disallowance; (e) that a perusal of the last three years sales, sales promotion expenditure and percentage of such expenditure to sales revealed that assessee had incurred much less sales promotion expenditure during the year under consideration viz. A.Y. 2011-12 as in comparison to the preceding years i.e. A.Ys 2009-10 and 2010-11; and (f) even the sales promotion expenditure to sales ratio had declined to merely 0.91% in A.Y. 2011-12 as in comparison to the earlier years i.e. A.Y. 2010-11 (1.09%) and A.Y. 2009-10 (1.29%). It was further observed by the CIT(A) that in the trade line of the assessee, it was a normal business practice to distribute sales promotion articles to stockists, distributors, dealers, customers and doctors in order to promote volume of sales. The CIT(A) taking support of certain judicial pronouncements observed that as incurring of said expenditure was neither in the nature of a capital expenditure nor personal expenditure, therefore, the same was held by the courts as an expenditure allowable under Sec. 37(1) of the Act. On the basis of his aforesaid deliberations the CIT(A) was of the view that distribution of sale promotion articles to stockists, distributors, dealers, customers clearly fell within the sweep of expenditure which was incurred by the assessee for its business interest. The CIT(A) was further of the view that as the dealers selling the products of the assessee company were certainly its lifeline, thus reasonable amounts spent on distribution of sales promotion articles backed with the intent to promote the goodwill and enhancing the business interest of the assessee could in no way be termed as an illegal expenditure. It was further observed by the CIT(A) that the total sales promotion expenditure of Rs. 9,70,82,317/- comprised of viz. (i) expenditure incurred on sales promotion articles costing more than Rs. 750/- per article : Rs. 71,65,680/- ; and (ii) expenditure incurred on sales promotion articles costing less than Rs. 750/- per article : Rs. 8,99,16,637/-. In the backdrop of the aforesaid facts the CIT(A) concluded that the expenditure incurred by the assessee on purchase of sales promotion articles costing upto Rs. 750/- per article were to be

considered to have been incurred wholly and exclusively by the assessee for its business purposes. In respect of the expenditure incurred by the assessee on sales promotion articles costing more than Rs. 750/- per article, the CIT(A) was of the view that the same were distributed predominantly to doctors and medical professionals in addition to stockists, chemists, distributors and customers. The CIT(A) was further of the view that the sales promotion articles costing less than Rs. 750/- per article were primarily distributed by the assessee to stockists, chemists, distributors and customers. It was further observed by the CIT(A) that out of the sales promotion articles exceeding a cost of Rs. 750/- per article, the same, *inter alia,* included an item namely glucometers purchased along with glucostrips by the assessee during the year for Rs. 5,15,995/-. The said glucometers alongwith the glucostrips were given by the assessee to its field staff, with a direction to hold diabetes detection camps in respective head quarters every month for promoting the anti-diabetic medicine sold by the assessee company. It was further noticed by the CIT(A) that BP instruments, clocks and watches, tracksuits etc. were given by the assessee to the doctors, while for some of the BP instruments were kept at the companies branches for using them in health camps. The CIT(A) deliberating on the nature of the sales promotion articles, observed that the same comprised of tracksuits, watches/clocks, electrical kettles, stainless steel utensil sets etc. which were distributed by the assessee through its field staff to the stockists, distributors and doctors. However, the assessee despite specific directions by the CIT(A) to place on record material evidences and documents in respect of sales promotion articles worth more than Rs. 750/- per article, failed to furnish the same. In the backdrop of the aforesaid facts the CIT(A) concluded that as the expenditure of Rs. 8,99,16,637/- incurred by the assessee on sales promotion articles costing less than Rs. 750/- per article could safely be related to the articles which were distributed by the assessee to its distributors, stockists, dealers and customers with the purpose of promoting its goodwill and enhancing the business interest, thus the same being an expenditure incurred by the assessee wholly and exclusively for the

purpose of its business was allowable as an expenditure in its hands. On the basis of his aforesaid observations the CIT(A) deleted the disallowance of the sales promotion expenses of Rs. 8,99,16,637/-. Still further, the CIT(A) was of the view that the sales promotion articles comprising of costly articles worth more than Rs. 750/- per article were primarily distributed by the assessee as "freebies" to the doctors and medical professionals. The CIT(A) observed that out of the sales promotion articles of a cost of more than Rs. 750/- per article aggregating to an amount of Rs. 71,65,680/-, an amount of Rs. 5,15,995/- pertained to the purchase of glucometers along with glucostrips which were used by the field staff for holding diabetes detection camps. As regards the balance expenditure of Rs. 66,49,685/- [Rs. 71,65,680/- (-) Rs. 5,15,995/-] the CIT(A) was of the view that the same being costly articles would have been distributed as "freebies" by the assessee to the doctors and medical professionals. The CIT(A) observed that such distribution of "freebies" to the doctors and professionals by the assessee company was in violation of the CBDT Circular No. 5/2012 issued vide F.No. 225/142/2012-ITA.II, dated 01.08.2012 and also against the regulation issued by the Medical Council of India, which was a regulatory body constituted under the Medical Council Act, 1956. In the backdrop of his aforesaid observations the CIT(A) concluded that as the aforesaid amount of Rs. 66,49,685/- was incurred by the assessee for a purpose which was prohibited by the law, thus the same was not allowable as per the *Explanation* to Sec. 37(1) of the Act. On the basis of his aforesaid deliberations the CIT(A) upheld the disallowance of the sales promotion expenses to the extent of Rs. 66,49,685/-.

19. The assessee being aggrieved with the order of the CIT(A) to the extent he had sustained the disallowance of sales promotion expenses of Rs. 66,49,685/-, has carried the matter in appeal before us. The revenue on the other hand has assailed before us the deletion of the disallowance of the sales promotion expenses of Rs.9,04,32,632/- by the CIT(A). The Ld. A.R taking us through the observations of the lower authorities submitted that

the CIT(A) had disallowed the expenditure incurred by the assessee on sales promotion articles of a cost exceeding Rs. 750/- per article, for the reason that the same having been distributed as 'freebies" to doctors and medical professionals was in violation of the CBDT Circular No. 5/2012, dated 01.08.2012 and also against the regulation issued by the MCI, a regulatory body constituted under the Medical Council Act, 1956. The Ld. A.R taking us through the observations of the CIT(A) submitted that he had observed that the genuineness of the expenditure incurred by the assessee on sales promotion expenses of Rs. 9,70,82,317/- was not disputed by the revenue. The Ld. A.R in support of his contention that the allowability of the sales promotion expenses incurred by the assessee by distribution of articles to the stockists, distributors, dealers, customers and doctors was not covered by the CBDT Circular No. 5/2012, dated 01.08.2012 or by the MCI regulations, relied on the orders passed by the coordinate benches of the Tribunal viz. (i) Simcon Formulations (I) Ltd. Vs. DCIT-8(3), Mumbai (ITA No. 6429/Mum/2012, dated 23.12.2015); and (ii) DCIT-8(2), Mumbai Vs. PHL Pharma P. Ltd. (ITA No. 4605/Mum/2014, dated 12.01.2017). The Ld. A.R taking support of the aforesaid judicial pronouncements submitted that even if the sales promotion articles distributed by the assessee were to be held as "freebies", the same still would not be hit by the CBDT Circular No. 5/2012, dated 01.08.2012, as the same was not available during the year under consideration, viz. A.Y. 2011-12. It was averred by the Ld. A.R that the aforesaid CBDT Circular No. 5/2012, dated 01.08.2012 would only be applicable prospectively. It was further submitted by the Ld. A.R that the MCI regulations though were binding on the doctors or the medical professionals registered with the Medical Council of India, however the same would not be applicable to the assessee which was a pharmaceutical company. The Ld. A.R in order to drive home his contention that even distribution of "freebies" by a pharmaceutical company being an expenditure incurred wholly and exclusively for the purpose of its business, thus could not be disallowed, relied on the orders of the coordinate benches of the Tribunal viz. (i) M/s Solvay Pharma India Ltd. Vs. Pr.CIT, Mumbai (ITA No.

3585/Mum/2016, dated 11.01.2018); and (ii) Emcure Pharmaceuticals Ltd., Pune Vs. DCIT, Central Circle-2(1), Pune (ITA No. 1532/Pun/2015, dated 29.01.2018). Per contra, the Ld. D.R relied on the order passed by the A.O. It was submitted by the Ld. D.R that as the expenditure incurred by the assessee on distribution of articles was clearly in violation of the CBDT Circular No. 5/2012, dated 01.08.2012 as well as against the MCI guidelines, thus the same being in the nature of an expenditure for a purpose which was prohibited under law, had rightly been disallowed in totality by the A.O. It was further averred by the Ld. D.R that the CIT(A) had without any basis adopted a cut off amount of Rs. 750/- while partly sustaining the disallowance of the sales promotion expenses. The Ld. D.R rebutting the contention of the assessee that no such disallowance was made in the preceding years, submitted that as each and every year is an independent year, thus the same cannot form a basis for determining the allowability of the sales promotion expenses during the year under consideration. The Ld. D.R in order to buttress his contention that the sales promotion expenses incurred by the assessee were not allowable as an expenditure, relied on the judgment of the Hon'ble High Court of Punjab & Haryana in the case of CIT Vs. Kap Scan and Diagnostic Centre (P.) Ltd. (2012) 344 ITR 476 (P&H). The Ld. A.R further in support of his contention that the aforesaid expenses incurred by the assessee by way of distribution of "freebies" were not allowable in the backdrop of the CBDT Circular No. 5/2012, dated 01.08.2012 and the MCI guidelines, relied on certain judicial pronouncements viz. (i) DCIT, Circle-13(1), New Delhi Vs. Ochoa Laboratories Ltd., Noida (ITA No. 4114/Del/2009, dated 25.08.2017); (ii) ACIT, Circle-6(3), Mumbai Vs. Liva Healthcare Ltd., Mumbai (ITA No. 904/Mum/2013, dated 12.09.2016); and (iii) Confederation of Indian Pharmaceutical Industry (SSI) Vs. The Central Board of Direct Taxes (CWP No. 10793 of 2012, dated 26.12.2012)(HP). The Ld. D.R in the backdrop of his aforesaid contentions submitted that as the CIT(A) had without any basis restricted the disallowance of the sales promotion expenses only in respect of the articles of a cost of more than Rs. 750/-, thus his order may

be set aside and that of the A.O be restored. The Ld. A.R in his rejoinder submitted that the judgment of the Hon'ble High Court of Himachal Pradesh in the case of Confederation of Indian Pharmaceutical Industry (SSI) Vs. The Central Board of Direct Taxes (CWP No. 10793 of 2012, dated 26.12.2012)(HP) was considered by the ITAT, Mumbai Bench "C", Mumbai in the case of DCIT-8(2), Mumbai Vs. PHL Pharma (P.) Ltd (2017) 49 CCH 124 (Mum). It was further submitted by the Ld. A.R that the Tribunal after considering the aforesaid judgment had observed that as held by the High Court, if the assessee was able to establish that the MCI regulation was not applicable to the assessee, then the same could not be blindly applied in its case. The Ld. A.R further referring to the reliance placed by the revenue on the judgment of the Hon'ble High Court of Punjab & Haryana in the case of CIT Vs. Kap Scan and Diagnostic Centre (P.) Ltd. (2012) 344 ITR 476 (P&H), submitted that the said case was rendered in context of allowability of commission which was paid to the private doctors for referring the patients for diagnosis/scanning to the assessee company which was running a scanning and a diagnostic centre. The Ld. A.R submitted that the said judgment was also considered by the Tribunal while passing the order in the case of M/s PHL Pharma (P) Ltd. (supra). The Ld. A.R further averred that the order passed by the coordinate bench of the Tribunal in the case of ACIT, Circle-6(3), Mumbai Vs. Liva Healthcare Ltd., Mumbai (ITA No. 904/Mum/2013, dated 12.09.2016) was also considered by the Tribunal while adjudicating the case of M/s PHL Pharma (P) Ltd. (supra). It was submitted by the Ld. A.R that unlike the case of the present assessee, in the aforementioned case the expenses were incurred by the assessee for creating good relations with the doctors in lieu of expected favours from them for recommending to the patients the pharmaceuticals products dealt with by the company. As regards the reliance placed by the Ld. D.R on the order passed by the ITAT, Delhi in the case of M/s Ochoa Laboratories Ltd. (supra), it was the contention of the Ld. A.R that as the same pertained to the allowability of conference expenses which were incurred by the assessee,

thus the same being distinguishable on facts would not assist the case of the revenue.

20. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the cross appeals filed by the assessee and the revenue has been sought for adjudicating the allowability of the sales promotion expenses incurred by the assessee on the distribution of articles to the stockists, distributors, dealers, customers and doctors, in the backdrop of the CBDT Circular No. 5/2012, dated 01.08.2012 and the MCI regulations. We find that it is the case of the revenue that as per the CBDT Circular No. 5/2012, dated 01.08.2012 any expense incurred by a pharmaceutical or allied health sector industry in providing any "freebies" to medical practitioners or their professional associations in violation of the regulation issued by Medical Council of India which is a regulatory body constituted under the Medical Council Act, 1956, would be liable to be disallowed in the hands of such pharmaceutical or allied health sector industry or any other assessee which had provided such "freebies" and claimed the same as a deductible expense against its income in the accounts.

21. We have deliberated at length on the issue under consideration and after perusing the regulations issued by the Medical Council of India, find that the same lays down the code of conduct in respect of the doctors and other medical professionals registered with it, and are not applicable to the pharmaceuticals or allied health sector industries. Rather, a perusal of the provisions of the Indian Medical Council Act, 1956, reveals that the scope and ambit of statutory provisions relating to professional conduct of registered medical practitioners under the Indian Medical Council Act, 1956 is restricted only to the persons registered as medical practitioners with the State Medical Council and whose name are entered in the Indian Medical Register maintained under Sec. 21 of the said Act. We are of the considered

view that the scheme of the Indian Medical Council Act, 1956 neither deals with nor provides for any conduct of any association/society and deals only with the conduct of individual registered medical practitioners. In the backdrop of the aforesaid facts, it emerges that the applicability of the MCI regulations would only cover individual medical practitioners and not the pharmaceutical companies or allied health sector industries. Interestingly, the scope of the applicability of the MCI regulations was looked into by the Hon'ble High Court of Delhi in the case of Max Hospital, Pitampura Vs. Medical Council of India (CWP No. 1334/2013, dated 10.01.2014). In the aforementioned case the MCI had filed an 'Affidavit' before the High Court, wherein it was deposed by the council that its jurisdiction is limited only to take action against the registered medical professionals under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, and it has no jurisdiction to pass any order affecting the rights/interest of the petitioner hospital. We are of the considered view that on the basis of the aforesaid deposition of MCI that its jurisdiction stands restricted to the registered medical professionals, it can safely be concluded that the MCI regulations would in no way impinge on the functioning of the assessee company which is engaged in the business of manufacturing and sale of pharmaceutical and allied products. We thus, in the backdrop of our aforesaid deliberations are of the considered view that the code of conduct enshrined in the MCI regulations are solely meant to be followed and adhered by medical practitioners/doctors, and such a regulation or code of conduct would not cover the pharmaceutical company or healthcare sector in any manner. We are further of the view that in the backdrop of our aforesaid observations, as the Medical Council of India does not have any jurisdiction under law to pass any order or regulation against any hospital, pharmaceutical company or any healthcare sector, then any such regulation issued by it cannot have any prohibitory effect on the manner in which the pharmaceutical company like the assessee conducts its business. On the basis of our aforesaid observations, we are unable to comprehend that now when the MCI has no jurisdiction upon the pharmaceutical companies, then

where could there be an occasion for concluding that the assessee company had violated any regulation issued by MCI. We thus, in terms of our aforesaid observations are of the considered view that even if the assessee had incurred expenditure on distribution of "freebies" to doctors and medical practitioners, the same though may not be in conformity with the Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002 (as amended on 10.12.2009), however, as the same only regulates the code of conduct of the medical practitioners/doctors, therefore, in the absence of any prohibition on the pharmaceutical companies in incurring of such sales promotion expenses, the latter cannot be held to have incurred an expenditure for a purpose which is an offence or is prohibited by law. In this regard we are reminded of the maxim "*Expressio Unius Est Exclusio Alterius*", which provides that if a particular expression in the statute is expressly stated for a 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 assesses. Thus, now when the MCI regulations are applicable to medical practitioners registered with the MCI, then the same cannot be made applicable to pharmaceutical companies or other allied healthcare companies.

22. We shall now advert to the CBDT Circular No. 5/2012, dated 01.08.2012. We find that the aforesaid CBDT Circular reads as under:-

> *"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 freebess (freebies) to medical practitioner 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 failing 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 sub-section denies claim of any such expenses, 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."

We may herein observe that a perusal of the aforesaid CBDT Circular reveals that the "freebies" provided by the pharmaceutical companies or allied health sector industries to medical practitioners or their professional associations in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002 shall be inadmissible under Sec. 37(1) of the Income Tax Act, 1961, as the same would be an expense prohibited by the law. We are of the considered view that as observed by us hereinabove, the code of conduct enshrined in the notifications issued by MCI though is to be strictly followed and adhered by medical practitioners/doctors registered with the MCI, however the same cannot impinge on the conduct of the pharmaceutical companies or other healthcare sector in any manner. We find that nothing has brought on record which could persuade us to conclude that the regulations or

notifications issued by MCI would as per the law also be binding on the pharmaceutical companies or other allied healthcare sector. Rather, the concession made by the MCI before the Hon'ble High Court of Delhi in the case of Max Hospital Vs. MCI (CWP No. 1334/2013, dated 10.01.2014) fortifies our aforesaid view that MCI has no jurisdiction to pass any order or regulation against any hospital, pharmaceutical company or any healthcare sector. We further find that MCI had by adding Para 6.8.1 to its earlier notification issued as "Indian Medical Council Professional (Conduct, Etiquette and Ethics) Regulations, 2002" had even provided for action which shall be taken against medical practitioners in case they contravene the prohibitions placed on them. We find from a perusal of Para 6.8.1 that in case of receiving of any gift from any pharmaceutical or allied health care industry and their sales people or representatives, action stands restricted to the members who are registered with the MCI. In other words the censure/action as had been suggested on the violation of the code of conduct is only for the medical practitioners and not for the pharmaceutical companies or allied health sector industries. We are thus of the considered view that the regulations issued by MCI are *qua* the doctors/medical practitioners registered with MCI, and the same shall in no way impinge upon the conduct of the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI regulation in terms of *Explanation* to Sec. 37(1), then the same would debar the doctors or the registered medical practitioners and not the pharmaceutical companies and the allied healthcare sector for claiming the same as an expenditure.

23. We find that the CBDT as per its Circular No. 5/2012, dated 01.08.2012 had enlarged the scope and applicability of Indian Medical Council Regulation, 2002, by making the same applicable even to the pharmaceutical companies or allied healthcare sector industries. We are of the considered view that such an enlargement of the scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provision either under the Income Tax Act or under the Indian Medical

Council Regulations. We are of a strong conviction that the CBDT cannot provide *casus omissus* to a statute or notification or any regulation which has not been expressly provided therein. Still further, though the CBDT can tone down the rigours of law in order to ensure a fair enforcement of the provisions by issuing circulars for clarifying the statutory provisions, however, it is divested of its power to create a new impairment adverse to an assessee or to a class of assessee without any sanction or authority of law. We are of the considered view that the circulars which are issued by the CBDT must confirm to the tax laws and though are meant for the purpose of giving administrative relief or for clarifying the provisions of law, but the same cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of a regulation issued under a different act so as to impose any kind of hardship or liability on the assessee. We thus, are unable to persuade ourselves to subscribe to the rigours contemplated in the CBDT Circular No. 5/2012, dated 01.08.2012, which we would not hesitate to observe, despite absence of anything provided by the MCI in its regulations issued under the Medical Council Act, 1956, contemplating that the regulation of code of conduct would also cover the pharmaceutical companies and healthcare sector, however provides that in case a pharmaceutical or allied health sector industry incurs any expenditure in providing any gift, travel facility, cash, monetary grant or similar freebies to medical practitioners or their professional associations in violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, the expenditure incurred on the same shall be disallowed in the hands of such pharmaceutical or allied health sector industry. We are of the considered view that the burden imposed by the CBDT vide its aforesaid Circular No. 5/2012, dated 01.08.2012 on the pharmaceutical or allied health sector industries, despite absence of any enabling provision under the Income Tax law or under the Indian Medical Council Regulations, clearly impinges on the conduct of the pharmaceutical and allied health sector industries in carrying out its business. We thus, in the absence of any sanction or authority of law on the basis of which it could safely be

concluded that the expenditure incurred by the assessee company on sales promotion expenses by way of distribution of articles to the stockists, distributors, dealers, customers and doctors, is in the nature of an expenditure which had been incurred for any purpose which is either an offence or prohibited by law, thus conclude that the same would not be hit by the *Explanation* to Sec. 37(1) of the Act.

24. Alternatively, we are of the considered view that it is a trite law that a CBDT Circular which creates a burden or liability or imposes a new kind of imparity, cannot be reckoned retrospectively. We are of the considered view that though a benevolent circular may apply retrospectively, but a circular imposing a burden has to be apply prospectively only. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of Director of Income-tax Vs. S.R.M.B Dairy Farming Pvt. Ltd. (2018) 400 ITR 9 (SC). The Hon'ble Apex Court in its aforesaid judgment has held that beneficial circulars had to be applied retrospectively, while oppressive circulars had to be applied prospectively, observing as under:

> *"25. It is in this context, the question arises, when the instruction expressly states that the benefit of the said policy is prospective, still can the courts place a construction on such instruction so as to make it retrospective. In this context, the apex court in the case of* CCE v. Mysore Electricals Industries Ltd. reported in [2006] 204 ELT 517 (SC) : [2007] 8 RC 1*, dealing with the question how a beneficial circular is to be construed, has approached this question in the following manner. At paragraph 13 of the judgment, it is stated that the learned counsel further submitted that the circular being oppressive and against the respondent, has to apply only prospectively and cannot be applied retrospectively. In other words, a beneficial circular has to be applied prospectively. Thus, when the circular is against the assessee they have a right to claim the enforcement of the same prospectively. It is further submitted that for the period in question, trade notices had been issued classifying the circuit breakers under heading No. 85.35 or 85.36. When the approved classification was proposed to be revised to reclassify the single panel circuit breakers under heading No.85.37 of the tariff, such re-classification can take effect only prospectively from the date of communication of the show-cause notice proposing reclassification."*

We find that the aforesaid CBDT Circular No. 5/2012, dated 01.08.2012 had came up for consideration before a coordinate bench of the Tribunal in the case of DCIT Vs. PHL Pharma (P) Ltd. (2017) 49 CCH 124 (Mum),

wherein the Tribunal after deliberating at length on two aspects viz. (i) validity of the circular in the backdrop of enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT, without any enabling provisions either under the Income Tax Law or under the Indian Medical Council Regulations; and (ii). the prospective applicability of the circular, had observed as under:

> *"5. We have considered the rival contentions made by ld. CIT DR as well as ld. 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:*

Sr.No	*Particulars of expenses*	*Amount (in Rs.)*
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 failing 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 sub-section 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".

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 vs. MCI in WPC 1334/2013 judgment dated 10.01.2014, 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 Explanation1 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*
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;	*Gifts more than Rs. 1,000/ - upto Rs. 5,000/- : Censure* *Gifts more than Rs. 5,000/- upto Rs. 10,000/- : Removal from Indian Medical Register or State Medical Register for 3 (three) months* *Gifts more than Rs. 10,000/ - to Rs. 50,000/- : Removal from Indian Medical Register or State Medical Register for 6(six) months.* *Gifts more than Rs. 50,000/- to Rs. 1,00,000/ - : Removal from Indian Medical Register or State Medical Register for 1 (one) year.* *Gifts more than Rs. 1,00,000/* *- : Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register*
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	*Expenses for travel facilities more than Rs. 1,000/ - upto Rs. 5,000/* *-: Censure*

their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc. as a delegate.	*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 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*
c) Hospitality: A medical practitioner shall notaccept individually any hospitality like hotel accommodation for self and family members under any pretext.	*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 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:-	*Cash or monetary grants more than Rs. 1,000/-upto Rs. 5,000/-: Censure.*

A medical practitioner shall not receive any cas or monetary grants from any pharmaceutical an allied healthcare industry for individual purpose i individual capacity under any pretext. Funding fc medical research, study etc. can only be receive through approved institutions by modalities lai down by law / rules / guidelines adopted by suc approved institutions, in a transparent manner. shall always be fully disclosed	*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 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.Explanation1, 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 co-ordinate Bench of the ITAT, Mumbai Bench in the case of Syncom Formulations (I) Ltd. (in ITA Nos. 6429 & 6428/Mum/2012 for A.Ys. 2010-11 and 2011-12, vide order dated 23.12.2015), wherein Tribunal held that CBDT circular would not be 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) vs. CBDT (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 'Liva Healthcare Limited ITA Nos. 904 & 945/Mum/2013', decided vide order dated 12.09.2016. 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, 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 vs. Liva Healthcare Ltd. (ITA 847/Mum/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 (SC) 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. vs. ACIT (ITA No. 4791/Mum/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 Pvt. Ltd. v. ITO (ITA No. 6681/Mum/2013 order 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 disallowbility 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 vs. Kap Scan and Diagnostic Centre (P.) Ltd. [2012] 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) Limited v. CIT (2000) 111 Taxman 561(SC), 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 subsection (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 subsection (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."

Still further, the coordinate bench of the Tribunal in the case of India Medtronic Pvt. Ltd. Vs. DCIT (2018) 52 CCH 43 (Mum), following the view taken by the Tribunal in the case of PHL Pharma Pvt. Ltd. (supra), had concluded that the MCI guidelines are only applicable to the doctors and the medical professionals registered with the council, and cannot govern the other tax entities like drug manufacturing companies or individuals other than the doctors. In the backdrop of the aforesaid observations, the Tribunal had observed that the MCI guidelines cannot decide the allowability or otherwise of an expenditure in the hands of such other entities under the Income-tax Act, 1961. It was further observed by the Tribunal that the Income tax Act is an independent code in itself and the business income of an assessee has to be assessed and taxed as envisaged under the provisions of the Act. On the basis of the limited scope of applicability of the MCI guidelines to a particular class of the society viz. doctors or medical practitioners registered with the council, the Tribunal had concluded that the guidelines issued by MCI would only regulate the code of conduct of the

doctors and the medical practitioners registered with it and would not be applicable to other entities.

25. We thus, in the backdrop of the aforesaid settled position of law as regards the prospective applicability of an oppressive circular, are of the considered view that as the CBDT as per its Circular No. 5/2012, dated 01.08.2012 had enlarged the scope of Indian Medical Council Regulation, 2002, and had made the same applicable to the pharmaceutical companies, thus the same cannot be reckoned to have a retrospective effect. We find that a coordinate bench of the Tribunal viz. ITAT, Mumbai in the case of Syncom Formulations (I) Ltd. Vs. DCIT-8(3), Mumbai (ITA No. 6428 & 6429/Mum/2012, dated 23.12.2015) for A.Ys 2010-11 and 2011-12 had concluded that the aforesaid CBDT Circular No. 5/2012, dated 01.08.2012 would not be applicable to the A.Ys 2010-11 and 2011-12, as the same was introduced w.e.f. 01.08.2012. We thus, in terms of our aforesaid observations are of the considered view that the aforementioned CBDT Circular No. 5/2012, dated 01.08.2012 would not be applicable to the case of the assessee before us for A.Y. 2011-12.

26. We shall now advert to the judicial pronouncements which had been relied upon by the ld. D.R before us :

(i) DCIT, Circle-13(1), New Delhi Vs. Ochoa Laboratories Ltd., Noida (ITA No. 4114/Del/2009, dated 25.08.2017)

That the aforesaid order passed by the ITAT, Delhi pertained to the allowability of expenses incurred by the assessee in respect of hotel bookings at New Delhi, Cochin or Kochi against “Dermacon Conference” at Hyderabad, providing free air travel, stay and food in hotels, local car conveyance etc., which were held by the Tribunal as being akin to giving commissions to the doctors for prescribing medicines manufactured by the assessee company. The facts involved in the said case being distinguishable as against that

of the present assessee before us, thus would not assist the case of the revenue.

(ii) ACIT, Circle-6(3), Mumbai Vs. Liva Healthcare Ltd., Mumbai (ITA No. 904/Mum/2013, dated 12.09.2016)

In the aforesaid order passed by the coordinate bench of the Tribunal, expenses were incurred by the assessee for creating good relations with the doctors in lieu of expected favours from them for recommending to the patients the pharmaceuticals products of the company. We find that the Tribunal while adjudicating the case of DCIT-8(2), Mumbai Vs. PHL Pharma (P.) Ltd. had considered the aforesaid order of the Tribunal.

(iii) Confederation of Indian Pharmaceutical Industry (SSI) Vs. The Central Board of Direct Taxes (CWP No. 10793 of 2012, dated 26.12.2012)(HP):

We find that the aforesaid judgment of the Hon'ble High Court of Himachal Pradesh was considered by the ITAT, Mumbai Bench "C", Mumbai in the case of DCIT-8(2), Mumbai Vs. PHL Pharma (P.) Ltd. The Tribunal after considering the aforesaid judgment had observed that as held by the High Court, if the assessee was able to establish that the MCI regulation was not applicable to the assessee, then the same could not be blindly applied in its case.

(iv) CIT Vs. Kap Scan and Diagnostic Centre (P.) Ltd.
(2012) 344 ITR 476 (P&H):

We find that the judgment in the aforesaid case was rendered in context of the commission paid by the assessee company which was running a scanning and a diagnostic centre to the private doctors for referring patients for diagnosis/scanning. Thus, the facts involved in the case before the High Court are distinguishable as against those in the case of the assessee before us. Still further, the said judgment was also considered by the Tribunal while

passing the order in the case of DCIT-8(2), Mumbai Vs. PHL Pharma (P.) Ltd.

27. We thus, in terms of our aforesaid observations conclude that the assessee was duly entitled for claim of sales promotion expenses of Rs. 9,70,82,317/- incurred on the distribution of articles to the stockists, distributors, dealers, customers and doctors. Thus, the order of the CIT(A) sustaining the disallowance of the sales promotion expenses to the extent of Rs. 66,49,685/- is set aside. In terms of our aforesaid observations the entire disallowance of the sales promotion expenses of Rs. 9,70,82,317/- made by the A.O is deleted.

28. The appeal of the assessee viz. ITA No. 5553/Mum/2014 is allowed and the appeal of the revenue viz. ITA No. 6129/Mum/2014 is dismissed.

ITA No. 5479 & 5747/Mum/2015
A.Y. 2012-13

29. We shall now take up the cross appeals filed by the assessee and the revenue for A.Y. 2012-13. The assessee assailing the order passed by the CIT(A) to the extent he had sustained the disallowance of sales promotion expenses of Rs. 77,42,416/-, has raised before us the following grounds of appeal

"1. For that the Ld. CIT(A) has erred in sustaining disallowance of sales promotion expense amounting to Rs.77,42,416/-.

2. For that the Ld. CIT(A) has erred in holding that expenditure incurred for distribution of costly articles (exceeding Rs.750/- each article) are freebies to doctors and professionals.

3. For that the Ld. CIT(A) has erred in holding that the such expenditures (exceeding Rs.750/- each articles) have been incurred in violation of CBDT circular no. 5/2012 dated 01.08.2012 and are against regulations issued by Medical Counsel of India.

4. For that the Ld. CIT(A) has erred in holding that such expenditures are prohibited by law and thus hit by Explanation to section 37(1).

5. For that the sustenance of disallowance of Rs.77,42,416/- is wrong, illegal and unjustified on the facts and in the circumstances of the appellant's case.

6. For that the whole order sustaining disallowance of Rs.77,42,4161- is bad in fact and law of the case and is fit to be modified.

7. For that the whole order is bad in fact and law of the case and is fit to be modified.

8. For that the other grounds, if any, shall be urged at the time of hearing of the appeal"

30. The revenue on the other hand has assailed the order of the CIT(A) for A.Y. 2012-13 on the ground that he had erred in deleting the disallowance of sales promotion expenses of Rs. 10,60,02,763/-by restricting the disallowance of the same only in respect of the expenditure incurred by the assessee on sales promotion articles costing more than Rs. 750/- per article, by raising before us the following grounds appeal :

""On the facts and in the circumstances of the case and in Law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

1. The order of the CIT(A) is opposed to law and fact of the case.

2. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in allowing all sales promotion articles costing up to the cost price of Rs. 750/- each u/s. 37(1), on the ground that these are wholly and exclusively incurred for the assessee's business purposes when supporting evidences have not been furnished by the assessee.

3. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in allowing sales promotion expenses, without appreciating the prohibition imposed b the Medical Council of India on medical practitioners from accepting gifts, travel facilities, hospitality, cash or monetary grants (freebies) from pharmaceutical and allied healthcare sector Industry and the Circular no 5/2012 issued by CBDT not to allow such expenses which are prohibited by law."

31. Briefly stated, the assessee company had e-filed its return of income for A.Y. 2012-13 on 21.09.2012, declaring a total income of Rs. 270,68,80,787/-. The case of the assessee was thereafter taken up for

scrutiny assessment under Sec. 143(2) of the Act. The A.O *inter alia* carrying out a disallowance of Rs. 11,37,45,179/- of sales promotion expenses assessed the income of the assessee company under Sec. 143(3) at Rs. 282,06,25,970/-. The book profit of the assessee under Sec. 115JB was computed by the A.O at Rs. 365,71,93,685/-. The A.O while framing the assessment had disallowed the entire amount of sales promotion expenses of Rs. 11,37,45,179/- for the reason viz. (i) the Medical Council of India (MCI) had imposed prohibition on medical practitioners from accepting gifts, travel facilities, hospitalities, cash or monetary grants (known as "freebies") from pharmaceutical and allied health care sector industry; and (ii) the CBDT circular No. 5/2012 issued vide F.No. 225/142/2012-ITA.II, dated 01.08.2012 had clarified that such "freebies" shall be inadmissible under Sec. 37(1) of the Act, being an expense prohibited by the law. On the basis of the aforesaid deliberations the A.O being of the view that the expenditure incurred by the assessee on distribution of "freebies" was inadmissible as per the *Explanation* to Sec. 37(1) of the Act, thus disallowed the entire amount of sales promotion expenses of Rs. 11,37,45,179/- debited by the assessee under the said head of expenditure.

32. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee before him, observed that the issue under consideration was squarely covered by the order passed by his predecessor while disposing off the appeal of the assessee for the immediately preceding year viz. A.Y. 2011-12. The CIT(A) following the view taken by his predecessor, thus restricted the disallowance of the sales promotion expenditure to the extent of Rs. 77,42,416/- i.e the expenditure which was incurred by the assessee on sales promotion articles costing more than Rs. 750/- per article. In the backdrop of his aforesaid observations the CIT(A) restricted the disallowance to the extent of Rs. 77,42,416/- and deleted the balance addition/disallowance of Rs. 10,60,02,763/- [Rs. 11,37,45,179/- (-) Rs. 77,42,416/-].

33. That both the assessee and the revenue being aggrieved with the order of the CIT(A) has carried the matter by way of cross appeals before us. We find that the issue involved in the present case viz. disallowance of sales promotion expenditure remains the same, as was there before us in the assesses own case for the immediately preceding year viz. A.Y. 2011-12 as had been adjudicated by us hereinabove, except for the fact that in the present case the CBDT Circular No. 5/2012, dated 01.08.2012 had came into force during the year under consideration. Be that as it may, we are of the considered view that as deliberated by us at length hereinabove, the aforementioned CBDT Circular No. 5/2012, dated 01.08.2012 had enlarged the scope of MCI regulations and made the same applicable to the pharmaceutical companies, without any enabling provision either under the Income Tax Act or the Indian Medical Council Regulations. We are of the considered view that as observed by us hereinabove, the CBDT by extending the scope and gamut of the MCI Regulation had by so doing traversed beyond the scope of its jurisdiction and provided *casus omissus* to the regulation issued by MCI, which though had not been expressly provided therein. We thus, being of the view that as the CBDT is divested of its power to create a new impairment adverse to an assessee or to a class of assessee without any sanction or authority of law, therefore, are unable to persuade ourselves to subscribe to the rigours contemplated as regards the pharmaceutical companies or the allied healthcare sector in the CBDT Circular No. 5/2012, dated 01.08.2012. We would not hesitate to observe that despite an absence of enlargement of the scope of the regulations issued by the MCI under the Medical Council Act, 1956, therein bringing within the sweep of its code of conduct the pharmaceutical companies and allied health sector industry, the CBDT had however in all its wisdom provided that in case a pharmaceutical or allied health sector industry incurs any expenditure in providing any gift, travel facility, cash, monetary grant or similar freebies to medical practitioners and their professional associations in violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, the same shall be

disallowed in the hands of such pharmaceutical or allied health sector industry. We are unable to persuade ourselves to subscribe to the burden imposed by the CBDT vide its aforesaid Circular No. 5/2012, dated 01.08.2012 on the pharmaceutical or allied healthcare sector industries, which as observed by us hereinabove, despite there being an absence of any enabling provisions under the Income Tax law or the Indian Medical Council Regulations, therein contemplating an authority to regulate the conduct of the pharmaceutical and allied health sector industries, had clearly impinged on the conduct of business by the latter. We thus, in the absence of any sanction or authority of law on the basis of which it could safely be concluded that the assessee company which is engaged in the business of manufacturing and sale of pharmaceuticals and allied products, had in the garb of sales promotion expenses incurred expenditure in respect of articles distributed to the stockists, distributors, dealers, customers and doctors, for a purpose which is either an offence or prohibited by law, are thus of the considered view that such expenditure incurred by the assessee would not be hit by the *Explanation* to Sec. 37(1) of the Act.

34. We thus, in terms of our aforesaid observations conclude that the assessee was duly entitled for claim of sales promotion expenses of Rs. 11,37,45,179/- incurred on the distribution of articles to the stockists, distributors, dealers, customers and doctors. Thus, the order of the CIT(A) sustaining the disallowance of the sales promotion expenses to the extent of Rs, 77,42,416/- is set aside. The entire disallowance of the sales promotion expenses of Rs. 11,37,45,179/- made by the A.O is deleted.

35. The appeal of the assessee viz. ITA No. 5479/Mum/2015 is allowed and the appeal of the revenue viz. ITA No. 5747/Mum/2015 is dismissed.

36. The appeals of the assessee for the A.Ys. 2005-06, 2011-12 and 2012-13, viz. ITA. No. 5167/Mum/2015, ITA No. 5553/Mum/2014 and ITA No. 5479/Mum/2015, respectively, are allowed. The appeal of the assessee for A.Y. 2009-10 viz. ITA No. 6680/Mum/2012 is allowed for statistical

purposes. The appeals of the revenue for A.Ys. 2011-12 and 2012-13, viz. ITA No. 6129/Mum/2014 and ITA No. 5747/Mum/2015, respectively, are dismissed.

Order pronounced in the open court on 26/07/2018

Sd/-	Sd/-
(G.S.PANNU) ACCOUNTANT MEMBER	(RAVISH SOOD) JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 26.07.2018
Ps. Rohit

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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**