

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.5012/Del/2016
(Assessment Year: 2012-13)

The ACIT, Circle 15 (2), C.R. Building, New Delhi.	Vs	Life Star Pharma Pvt.Ltd., 208, Okhla Industrial Estate, Phase-3, New Delhi. PAN No : AABCL3646F
Department by	Smt. Naina Soin Kabil, Sr.DR	
Assessee by	Shri Sumit Goel, CIT(A) & Shri J.P.Sharma,CA	

Date of Hearing	13.09.2018
Date of Pronouncement	10.12.2018

ORDER

PER DIVA SINGH :

The present appeal has been filed by the Revenue assailing the correctness of the order dated 29.07.2016 of CIT(A)-5, Delhi pertaining to 2012-13 assessment year on the following grounds :

- "1. Whether, on the fact and in the circumstances of the case and in law , Id. CIT (A) was right in holding that the commission paid by the assessee to the doctors was allowable as it was in keeping with a trade practice and thus ignoring the fact that it was an illegal payment not allowable as per the explanation to section 37(1) of the act.?"*
- 2. Whether on the fact and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs. 69,07,000/- made on account of expenses incurred on Doctors ?*
- 3 That the grounds of appeal are without prejudice to each other.*
- 4 That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of the hearing.*

2. The relevant facts of the case are that the assessee company engaged in the business of marketing pharmaceutical products (medicines) through a nationwide network of C&F Agents in the course of the assessment proceedings was required to justify the business promotion expenses of Rs. 69,07,000/-. The CBDT Circular No. 5 of 2012 was referred to on the basis

of which the assessee was required to show cause that why the expenses claimed be not treated at par with illegal expenses. The assessee's explanation dated 06.02.2015 was rejected holding that the expenses claimed were unethical and illegal and being in violation of law including the IMCR's Regulations of 2002 regarding professional conduct, etiquettes and ethics. Disallowance of the said expense was made relying upon the Explanation below Section 37(1) of the Income Tax Act, 1961 and the Circular of the CBDT.

3. The assessee carried the issue in appeal before the CIT(A) assailing the addition made by way of disallowance. It was submitted that the expenses were necessary for business and have been incurred to increase the sales of the company. It was canvassed that the assessee even before the AO has submitted that there is a quantum jump in the sales of the assessee company as a result of this expenditure when compared to the immediately preceding assessment year. It was also submitted that the expenses pertain to the drugs which are 'H' category of drugs (drugs which can only be sold as per prescription and not over the counter) and thus, these were drugs which cannot be advertised and necessarily the doctors etc. had to be informed. It was also submitted that the violation of rules made by MCI envisages disciplinary action against the doctors but it does not make incurring of such an expenditure by the assessee prohibited in law. It was also submitted that since the MCI Rules are not enacted by the Parliament or the Constitution and hence Explanation-I to Section 37(1) does not apply considering the explanation offered.

4. The CIT(A) appreciating the position of law in para 4.3 to para 4.3.5 deleted the addition by way of disallowance holding as under :

4.3 I have given careful consideration to the submissions made. Section 37 is a residuary provision. An assessee is entitled to deduction of all expenditure which is wholly and exclusively laid out or expended for the purposes of the business which has not been expressly covered by any other specific provision of the Act. The Explanation to sub-section (1) was inserted by the Finance (No. 2) Act, 1998, with retrospective effect from April 1, 1962, which reads thus:

"Explanation.-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."

4.3.1 *The purpose for incorporation of this Explanation had been explained by the Central Board of Direct Taxes in Circular No. 772, dated December 23, 1998 ([1999] 235 ITR (St.) 35, 53) as under :*

"20. Disallowance of illegal expenses.

20.1 Section 37 of the Income-tax Act is amended to provide 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 purposes of business or profession and no deduction or allowance shall be made in respect of such expenditure. This amendment will result in disallowance of the claims made by certain assesseees in respect of payments on account of protection money, extortion, hafta, bribes, etc., as business expenditure. It is well decided that unlawful expenditure is not an allowable deduction in computation of income.

20.2 This amendment will take effect retrospectively from 1st April, 1962, and will, accordingly, apply in relation to the assessment year 1962-63 and subsequent years."

4.3.2 *I have also examined the guidelines laid down in the Notification no. MCI- 21.1(1)/2009(Ethics)/55667 dated 10.12.2009 which defines the code of conduct for doctors in their relationship with pharmaceutical companies vide para 6.8. The relevant portion of para 6.8 reads as under:*

"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 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 programmers etc as a delegate.

c) Hospitality: A medical practitioner shall not accept 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 or 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/ru/es/guide/ines adopted by such approved institutions, in a transparent manner. It shall be fully disclosed.

e)-----

f)-----

g)-----

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".

4.3.3 *Even prior to this amendment in the MCI Act, the Medical Council of India in exercise of powers conferred under section 20A read with section 33(m) or the Indian Medical Council Act, 1956 has made "The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002", which describes unethical acts under*

Chapter 6 of the said regulations. Regulation 6.4 provided that no physician shall give, solicit, receive, or offer to give, solicit or receive, any gift gratuity, commission or bonus in consideration of a return for referring any patient for medical treatment. Regulation 6.4 reads thus:

"6.4.1 A physician shall not give, solicit, or receive nor shall he offer to give solicit or receive, any gift, gratuity, commission or bonus in consideration of or return for the referring, recommending or procuring of any patient for medical, surgical or other treatment. A physician shall not directly or indirectly, participate in or be a party to act of division, transference, assignment, subordination, rebating, splitting or refunding of any fee for medical, surgical or other treatment"

4.3.4 The perusal of Regulation 6.4 of MCI Rules & Regulations shows that certain professional and ethical conduct is expected from the side of the physicians/doctors. The MCI Act & Rules are subject to the previous sanction of the Central Government and these are published in the Gazette of India. Therefore, the claim of the appellant that these rules are not statute, duly approved by the Parliament, has no force. The appellant's submission is also that the CBDT circular is not in cognizance with the provisions of law and is contrary to explanation to section 37(1). At this stage it may be mentioned that the validity of the CBDT circular has been upheld by the Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry (SSI) vs. CBDT (44 taxmann.com 365) in the following words: -

"The Medical Council of India in exercise of the powers vested in it under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 imposed prohibition on any medical practitioner or their professional associates from accepting any gift, travel facility, hospitality, cash or monetary grant from any pharmaceutical and allied health sector industries. This regulation is a very salutary regulation which is in the interest of the patients and the public. Once this has been prohibited by the Medical Council under the powers vested in it, section 37(1) comes into play. The Explanation to section 37(1) makes it clear that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. The sum and substance of the circular is also the same. In case the assessing authorities are not properly understanding the circular then the remedy lies for each individual assessee to file appeals under the IT Act but the circular which is totally in line with section 37(1) cannot be said to be illegal."

4.3.5 Consequently the expenditure has been prima facie correctly disallowed by the A.O and is in consonance with the provisions of the Act. The appellant has come up with the alternate submission that assuming the CBDT Circular has correctly interpreted the provisions in law, the same cannot be applied retrospectively as has been held by ITAT Mumbai in the case of Syncorn Formulations India Ltd. (ITA no. 6429 & 6428/Mum/2012) and ITAT Delhi in the case of Mankind Pharma Ltd. (ITA no. 2136 to 2138/Del/2013). I find that the ITAT Delhi has referred to the Allahabad High Court decision in the case of Pt. Vishwanath Sharma (216 CTR 281) while considering the issue relating to commission paid to Government doctors for prescribing the assessee's medicines to patients held it to be contravening public policy and an inadmissible expenditure whereas such commission paid to private doctors could not be said to be an offence under any statute. I may mention that this view has not been approved by Hon'ble Punjab & Haryana High Court in the case of Kap Scan and Diagnostic Centre Pvt. Ltd. (25 taxmann.com 92) which has held that no such artificial distinction, can be drawn between private doctors and government doctors. However since there is a decision of the jurisdictional ITAT order on the issue it is binding on the undersigned, being a legal issue, and the same needs to be respected. The issue is, therefore, decided in favour of the appellant. Ground No. 3 is allowed."

5. Aggrieved by this, Revenue is in appeal before the ITAT. The Id. Sr.DR relies upon the assessment order and on the circular of the CBDT.

6. The Id. AR, on the other hand, relying upon the submissions advanced before the CIT(A) and referring to the decisions made available in the Paper Book filed namely; DCIT Vs PHL Pharma Pvt Lid (Mumbai - Trib.)/[2017] 163 ITD 10; Hon'ble Mumbai ITAT decision in case of Syncom formulations (I) Ltd.; Hon'ble Mumbai ITAT decision in case of Emcure Pharmaceuticals Ltd. Vs DCIT 62 ITR (Trib.) 744 (Pune); Hon'ble Mumbai ITAT decision in case of Solvay Pharma India Ltd. Vs. Pr. CIT.(ITA NO. 3585/MUM/2016, Order Dtd, 11.01.2018) and Delhi ITAT decision in Mankind Pharma Ltd. (Group company) submitted that the issue is fully covered in favour of the assessee, accordingly the departmental appeal may be dismissed.

7. We have heard the rival submissions and perused the material on record. We find that in the facts of the present case, in the face of the decision of the Allahabad High Court in the case of Pt. Vishwanath Sharma 316 ITR 419 which has been followed by the Co-ordinate Bench vide its order dated 15.03.2016 in the case of Mankind Pharma Ltd. Vs ACIT which position of law has been followed by the CIT(A) in the present proceedings, the departmental appeal has to be dismissed. For ready reference, finding of the Co-ordinate Bench followed by the CIT(A) is extracted hereunder :

5. We have perused-the paper book placed before us, submissions and the judgments relied upon by the assessee. At the outset, we do not find any infirmity with the findings of the Id. CIT(A) which is supported by the judgement of the jurisdictional High Court. The decision of the coordinate bench of Mumbai in Syncom Formulations India Ltd. (supra) vide order dated 23/12/2015 goes further to support the argument of the assessee that no disallowance can be made of the expenditure prior to 1.08.2012. We find that the disallowance has been made by the Id. Assessing Officer, relying upon the CBDT Circular dated 1st August, 2012. The said circular cannot be applied to the years under consideration as it has been issued from 1st August, 2012, which is relevant for assessment year 2013-14. The years under consideration before us are 2008-09, 2009-10 & 2010-11. The Honble Jurisdiction High Court of Allahabad in the case of CIT Vs. Pt. Vishwanath Sharma reported in (2008)216 CTR 281, has held as follows:

" ... A distinction has already been made by the authorities while allowing deduction to the assessee in respect to commission which the assessee has paid to private doctors since in their case., the payment of commission cannot be said to be an offence under any statute but in respect to Government doctors such payment could not have been allowed as it is as offence under the statutes as stated above."

5.1. The Jurisdictional High Court has approved the finding of the authority that the payments made to private doctors cannot disallowed under section 37(1) of the act by relying upon the guidelines of MCI issued in the year 2002. Respectfully, following the judgment of the Jurisdictional High Court as well as the decision of the coordinate bench in Syncom Formulations India Ltd, (supra), we to the extent confirmed by the Ld. CIT(A).

7.1. The year under consideration, we have noticed is 2012-13 assessment year, it would not be out of place to even support the view taken relying upon the decision of the Co-ordinate Bench in the case of Solvay Pharma India Ltd. Vs Pr. CIT. For ready reference, para 24 of the aforesaid order is extracted hereunder :

24. We observe that the CBDT Circular dated 1-8-2012 (supra) in its clarification has enlarged the scope and applicability of Indian Medical Council Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries. Such an enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provisions either under the provisions of Income Tax Law or by any provisions under the Indian Medical Council Regulations, The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. The CBDT can tone down the rigours of law and ensure a fair enforcement of the provisions by issuing circulars and by clarifying the statutory provisions, CBDT 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 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.

8. Accordingly, in view thereof, the departmental appeal is dismissed.

This order was pronounced in the Open Court on 10/12/2018.

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Poonam(CHD)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

-Sd/-

(DIVA SINGH)
JUDICIAL MEMBER

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ASSISTANT REGISTRAR
ITAT NEW DELHI

1.	Draft dictated	27.11.2018	Sr.PS
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4.	Order signed and pronounced on		
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6.	Date on which file goes to the AR		
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8.	Date of dispatch of Order		

